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The Municipal Official's Guide to Avoiding Conflicts of Interest and Other Legal Pitfalls

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A Series of Conferences
Co-Sponsored by:
The Office of
Attorney General Tom Reilly,
The Massachusetts
District Attorneys, and
The State Ethics Commission

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January, 2001

Dear Colleague:

It is with great pleasure that the District Attorneys of Massachusetts, the State Ethics Commission, and the Office of Attorney General Tom Reilly have come together to co-sponsor **The Municipal Official's Guide to Avoiding Conflicts of Interest and Other Legal Pitfalls**. This seminar, which is being hosted in counties throughout the Commonwealth, focuses on important State laws governing the conduct of municipal officials and employees; laws which, if broken, can lead to criminal prosecution or administrative sanctions. Understanding the nature and nuance of these laws is critical, not only for the sake of avoiding liability, but more fundamentally for discharging the duties and obligations of our public jobs in a manner that promotes the trust and confidence of our citizens.

Together, the District Attorneys, the State Ethics Commission, and the Attorney General are committed to educating public employees about the civil and criminal laws which govern our conduct. We can not do this important work without your help! Please join us in this collaborative effort by passing along what you learn, or reconfirm, to co-workers and those whom you supervise.

We hope that the seminar, and the accompanying written materials, will serve as a useful resource to you and your city or town. We very much appreciate your role in supporting this educational initiative.

Sincerely,

Tom Reilly	Peter Sturges	Geline Williams
Attorney General	Executive Director	Executive Director
Attorney General's Office	State Ethics Commission	District Attorney's Association

A Practical Guide to the

Conflict of Interest Law

for Municipal Employees

STATE
ETHICS
COMMISSION

MASSACHUSETTS

A Practical Guide to the **Conflict of Interest Law** For Municipal Employees

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Preface

This Guide provides general guidance to town and city officials and employees on how to comply with the conflict of interest law. It is not meant to serve as formal advice or as a substitute for legal counsel.

If after reading this booklet you have questions about particular situations, you may request an advisory opinion from either the Ethics Commission or your town or city lawyer. The Ethics Commission urges municipal employees to take advantage of this opinion process. (See page 25 for information on how to obtain an advisory opinion.)

The conflict law may be amended from time to time by the state Legislature; be sure to consult the current version of the law or call the Commission's Legal Division at (617) 727-0060 for advice concerning the most recent application of the law.

Introduction to the Conflict of Interest Law

Purpose of the Law

The purpose of the conflict law is to ensure that public employees' private financial interests and personal relationships do not conflict with their public obligations. The law is broadly written to prevent a public employee from becoming involved in a situation which could result in a conflict or give the appearance of a conflict.

The law restricts what a public employee may do:

1. on the job
2. after hours (or "on the side")
3. after leaving public service

Who the Law Governs

Municipal Employees

The conflict law regulates the conduct of public officials and employees (referred to collectively in the law as "employees") at the state, county and municipal levels of government. The term "employee" at each level is defined expansively. You are considered a municipal employee if you hold any office, position, employment or membership in any municipal agency. It does not matter whether you are paid or unpaid or whether you serve full-time or part-time. People who work as consultants or on an intermittent basis are generally covered, as well. For example, unpaid members of local town or city boards or commissions are municipal employees, as are private citizens serving on a special advisory committee appointed by the mayor or board of selectmen to make recommendations on a specific issue. However, elected town meeting members or attendees at an open town meeting and members of a local charter commission are not considered "municipal employees" for purposes of the conflict of interest law.

"Special" Municipal Employees

"Special municipal employee" status may be assigned to certain municipal positions by a vote of the board of selectmen, board of aldermen or city council. Two sections of the conflict law apply less restrictively to special municipal employees. You are eligible to be designated as a special municipal employee provided that:

1. you are not paid; or
2. you hold a part-time position which allows you to work at another job during normal working hours; or
3. you were not paid by the city or town for more than 800 working hours (approximately 20 weeks full-time) during the preceding 365 days.

It is the municipal position which is designated as having special status, not the individual. Therefore, all employees holding the same office or position must have the same classification as special. For instance, one member of a school committee may not be classified as a special unless all members are similarly classified.

Selectmen in towns with a population of 10,000 or less are automatically special.

Selectmen in towns with a population of more than 10,000, city councillors, aldermen and mayors may *not* be designated special municipal employees.

The state Legislature may designate certain employees to be special municipal employees. For example, members of local housing and redevelopment authorities are defined by law as special municipal employees. (See G.L. c. 121B, §7.)

Municipal Agencies

A municipal agency includes all departments, offices, councils, divisions, boards, bureaus, commissions, institutions or tribunals of city or town government. In other words, all entities established by the community, such as the council on aging, the historical commission, the licensing board and the town by-law committee, are municipal agencies under the conflict law.

Regional Organizations

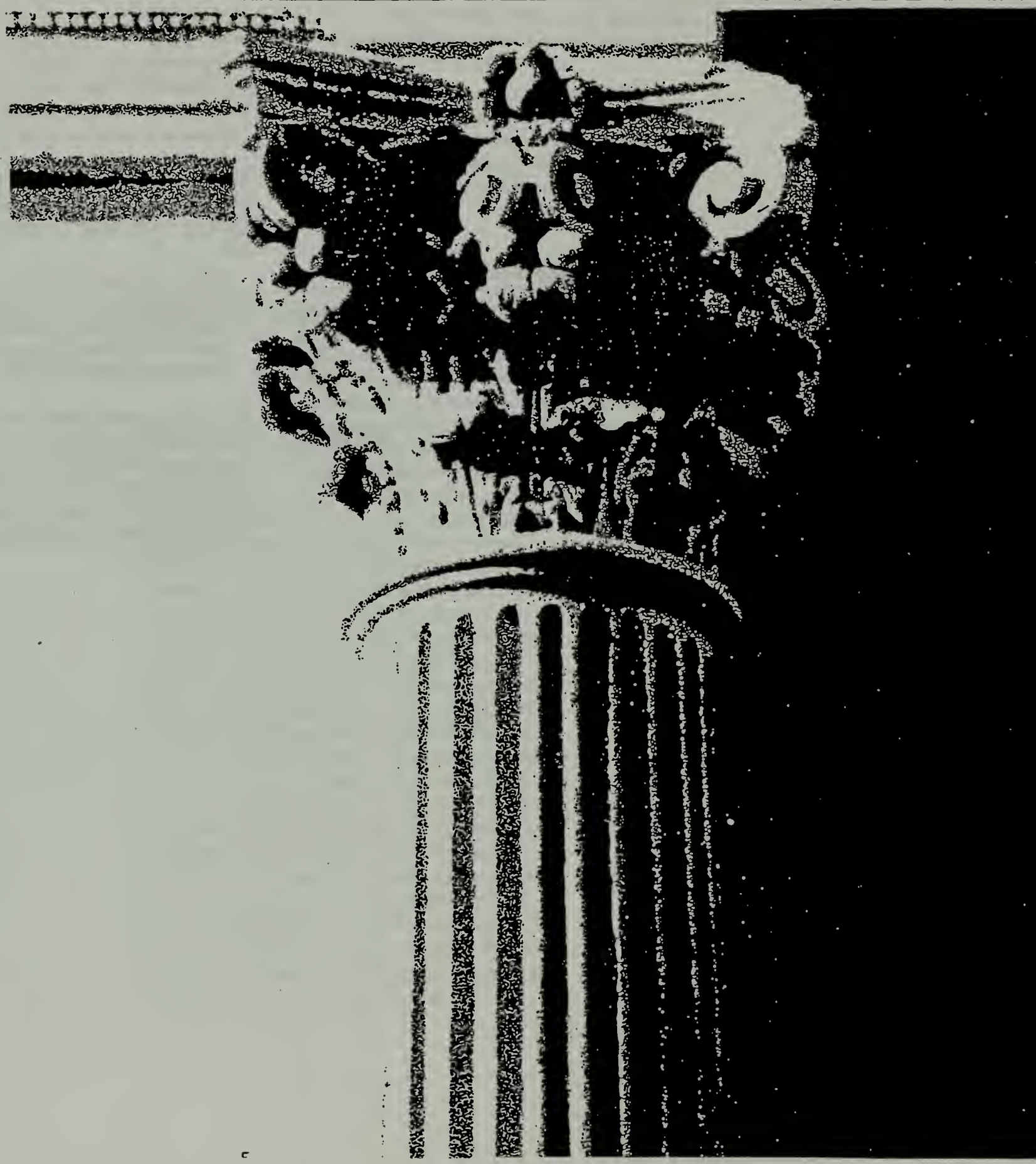
The status of regional bodies such as regional school districts is not clearly defined in the conflict law. However, the State Ethics Commission has ruled that many of these regional organizations are "municipal agencies" for purposes of the law because these organizations provide services to the community which individual towns would traditionally provide.

Some of the regional organizations determined by the State Ethics Commission on a case by case basis to be municipal agencies are:

Regional School Districts
Local Water and Fire Districts
Community Development Corporations
Local Arts Lottery Councils
Private Industry Councils

Certain regional bodies which are part of a state-wide organizational structure are not municipal agencies, but rather are considered state agencies. For example, regional transit authorities or regional mental health centers are considered state agencies for purposes of the conflict law.

How the Conflict of Interest Law Affects Municipal Employees



Restrictions "On The Job"

Bribes (Section 2)

The conflict law prohibits all public employees from seeking or receiving bribes, gifts, promises, or anything else of value in return for an official favor or a promise of action or inaction. In addition, the law prohibits public employees from accepting anything of value in exchange for committing any fraud on a state, county or municipal agency (or allowing anyone else to commit such a fraud). Finally, the law prohibits public employees from being influenced in giving testimony under oath or rendering themselves unavailable to testify. (The conflict law does not prohibit a public employee from receiving witness fees and other expenses allowed by law for testimony.)

A public employee violates Section 2 if the employee acts with a "corrupt intent." As a general rule, whenever there is an agreement that a public official will receive something of value from a private party for certain official action (or inaction), that agreement is sufficient evidence that the public employee is acting with corrupt intent.

The bribery section of the conflict law also applies to private parties; *anyone* who bribes or attempts to bribe a public official violates the conflict law and faces criminal sanctions.

The item of value which is solicited or accepted need not be money. Trips, for example, or improvements to one's home would be covered. The item of value need not be for the benefit of the public employee personally, but may be for the benefit of another person or an organization.

Example: The director of public works violates Section 2 by asking a contractor for a cash payment before he will approve the award of a town contract. The director also violates Section 2 if he demands a contribution to the mayor's re-election campaign in return for approving the contract. The contractor would violate the law by offering a bribe to the director in exchange for his approval of the contract. ▪

Gifts (Section 3)

It is illegal to request or accept anything of "substantial value" from anyone with whom you have or are likely to have official dealings (absent some family or social relationship which would explain the gift) even if the motivation for the gift is to express gratitude for a job well done or to foster goodwill.

It is also illegal for a *private party* to offer or give anything of substantial value to a public official or employee if it is given "for or because of" some act the official has performed or will perform; this is true even if there is no corrupt intent on the part of either the giver or the receiver.

In 1976 the Massachusetts Appeals Court decided that $50 is "substantial value." In 1985 the Commission issued a similar ruling. Items of "substantial value" range from cash, additional compensation and tips to free tickets and passes to entertainment events. In addition, free or discounted services such as construction or accounting work are considered gifts.

Example: A complaint is filed with the town public health department regarding a restaurant. An investigator screens the complaint and determines that no action should be taken on it. Grateful for this resolution of the matter, the restaurant owner invites the investigator and his family to a free dinner at his restaurant. If the investigator accepts the invitation, he violates Section 3 if the dinner is worth $50 or more. If the same investigator had asked for the free dinner from the restaurant owner in return for agreeing not to act on the complaint, he would violate Section 2 (the bribery section of the law). ▪

Example: A municipal purchasing agent awards several city office supply contracts to a stationery supplier who submits the lowest bids. At the end of the year, the general manager of the stationery firm offers the purchasing agent a set of luggage worth over $50 as a token of goodwill. The purchasing agent violates Section 3 if he accepts the gift. The supplier violates Section 3 simply by making the offer of luggage to the purchasing agent. ▪

Example: A car dealer which holds a major contract with the town police department offers a 40% discount to all town police officers. The car dealer violates Section 3 by offering the discount because it is being given only to town police officers who potentially could affect the car dealer's contract by praising or complaining about the cars' quality. The police officers will violate Section 3 if they take the discount and it totals $50 or more. ▪

For more detailed information on accepting or being offered "gifts," see Commission Advisory No. 8, the "Free Pass Advisory," available from the Commission's office.

Restrictions on Official Actions (Section 19)

Public employees must not act in their official capacities in matters in which they have a personal financial stake. The law also recognizes that the objectivity and integrity of municipal employees may be compromised if they act on matters affecting the financial interests of people or businesses with whom they are closely related.

Section 19 of the conflict law does not prevent municipal employees from having private financial interests or dealings in their town, but it does restrict what official actions, if any, they may take with respect to their private financial interests.

Acting on Private Financial Interests

To prevent public employees from using their positions to further private interests, the law prohibits municipal employees from participating in a "particular matter" in which they know that they personally, their immediate family or a business they are closely associated with has a financial interest. They are specifically prohibited from acting on matters affecting:

1. themselves
2. their "immediate family" (the employee and his or her spouse and their parents, children, brothers and sisters);
3. their partner;
4. a business organization in which they are serving as an officer, director, trustee, partner or employee (for example, if a municipal employee is an unpaid trustee of a private school she may not participate in a particular matter in which the school has a financial interest, even if she has no personal, direct financial interest herself); or
5. any person or organization with whom they are negotiating for or have any arrangement concerning future employment.

In summary, municipal employees may not act in their official position on any matter affecting the financial interest of themselves, their family or their businesses.

Example: An assessor in town wishes to apply for a tax abatement for his home. He may file the necessary papers and appear on his own behalf to argue for the abatement; however, in his official position as assessor, he may not discuss, recommend, analyze or decide whether to grant himself an abatement. ▪

Example: The elected treasurer is on the board of directors of a local bank. She will violate the law if she takes any official action affecting the bank's financial interest such as investing the town's money in certificates of deposit with the bank. (See page 11 for information on a narrow exemption for treasurers making demand bank deposits.) ▪

A municipal employee is prohibited from participating in a final decision affecting personal financial interests and also from participating in any of the steps along the way.

Finally, the "financial interest" at stake need not be present or immediate. Municipal employees may not participate in a matter if they have a "reasonably foreseeable" financial interest in that matter.

Example: A member of the zoning board of appeals is a developer. His corporation is negotiating to purchase a parcel of land in town. An application to rezone that land has been filed on behalf of the *current* owner. The zoning board member has a "financial interest" in the decision by his board whether to grant the zoning change because he may own the land in the foreseeable future. He would therefore be prohibited from participating in that board decision. ▪

Acting on a Competitor's Financial Interest

The conflict law restricts municipal employees from taking any official action which would affect the financial interest of their business competitors. Such action will ultimately affect the employee's own financial interest. The employee may also not take official action on matters concerning the competitors of his or her immediate family, business or employer.

There is no one easy "rule" for local officials to rely upon when deciding who an official's competitors are in any particular instance. In an advisory opinion concerning a liquor license the Ethics Commission indicated that local authorities are often in a better position than the Commission to identify the local factors which would make a liquor license holder a competitor. In that opinion, we suggested that the appointed official rely on his appointing authority to make such a determination. Elected officials should seek guidance from town or city counsel or from the Commission when faced with a similar issue.

Example: A selectman who owns a restaurant in town may not vote to approve her own liquor license. If the selectman is part-owner and is not active in running the restaurant, she must still abstain from participating. The selectman is also prohibited from voting on any liquor license matter involving an establishment in competition with her restaurant. ▪

Acting on Matters Affecting Family (Nepotism)

The conflict law prohibits a municipal official from participating in any particular matter affecting the financial interests of an "immediate family member." The purpose of the broad prohibition against acts of nepotism is to prevent potential conflicts or the appearance of favoritism which arise whenever a public official's personal loyalty to a family member competes with the need to make objective personnel decisions. "Immediate family member" is defined in the law as the employee and his or her spouse and their parents, children, brothers and sisters.

The following specific acts are prohibited:

1. hiring a family member;
2. *any* significant involvement in a hiring process in which a family member is an applicant, e.g., interviewing or creating a test for applicants;
3. *any* significant involvement in the reappointment, promotion, reclassification, demotion or firing of any family member;
4. determining a family member's salary (including approving "automatic" increases such as annual step increases);
5. conducting a job performance review of a family member;
6. day-to-day supervision of a family member;
7. delegating the task of dealing with an immediate family member to a subordinate.

1. *Voting on Budgets Including Family Members' Salaries*

In situations where a municipal official's immediate family member is employed by the same city or town, the official may not participate in any discussion or vote on any line item of a budget which would affect the family member's salary. The best course of action is simply to leave the room during the deliberation and vote of the board. The prohibition includes voting on a budget which will merely maintain the salary of an immediate family member at its present level or approving "automatic" salary step increases in a budget. The prohibition applies even in cases where a number of other employees are given similar increases.

A 1976 Supreme Judicial Court decision **Graham v. McGrail** provided the following guidelines to allow public officials to vote on the budget's "bottom line" when faced with this conflict. The board must identify the budget line item which includes the family member's salary and vote on it separately. The official whose family member's salary is affected by this line item must abstain from the discussion and vote. After all such conflicts are dealt with through this line item procedure, the board may then vote on the budget as a whole package, with all members participating in the final vote to approve the "bottom line."

Example: A school committee member whose father works as a custodian for the school department must abstain from voting on the line item of the budget which includes his salary. She appropriately leaves the room during any deliberation and vote on this matter. She may vote on other line items in the school department budget. She may also participate in the final vote to approve the budget as a whole at the end of this process. ■

In addition, an exemption is available for *appointed* municipal employees which will allow them to act on a budget affecting an immediate family member's financial interest. They must receive permission to participate from the public official or board which appointed them to their job (the appointing official). This disclosure and authorization procedure is discussed on page 10.

2. *Appearances of favoritism*

Some relatives such as cousins, aunts and nephews are not "immediate family" members for purposes of the conflict law. However, a public official's actions regarding these relatives may violate the Standards of Conduct (Section 23) of the conflict law.

Section 23 prohibits a public official from giving the impression that he or she can be improperly influenced by someone or that a relative could receive preferential treatment because of kinship. A public official must be careful to avoid this appearance of favoritism. The law states that an appointed public official will dispel this appearance by making a written disclosure to the official's appointing authority. The law requires that the appointing authority keep the disclosure open to inspection by the public. For elected officials who have no appointing authority, the written public disclosure must be filed with the town or city clerk. In addition, officials would be well advised to make the disclosure a matter of record prior to acting at a public meeting by having the disclosure recorded in the meeting minutes.

In addition to avoiding the "appearance" of favoritism, a public official is, in fact, prohibited from engaging in favoritism. Under the Standards of Conduct, public officials are prohibited from using their positions to secure an unwarranted privilege of substantial value ($50 or over) for anyone. Thus, if an elected official hired a nephew who was unqualified for the job — even if the official publicly disclosed the relationship — the official would violate the law because it would be an "unwarranted privilege" for the nephew to be paid for a job he could not adequately perform.

When *appointed* officials are faced with a nepotism conflict, the law provides an exemption procedure so that the officials may participate in the matter if they receive prior approval. (This is discussed under "Disclosure and Authorization Procedure" below.) However, *elected* officials may not take advantage of this procedure — they must always abstain from participating in a matter involving an immediate family member.

For more detailed information on exactly what constitutes a nepotism violation and what the Commission's enforcement policy is regarding these violations, see Commission Advisory No. 11, available from the Commission's office.

Exemptions 1 to 3

Exemption 1

Disclosure and Authorization Procedure

Appointed municipal employees may participate in a matter which affects their own, their immediate family's or their business' financial interest *only if* they receive permission from the public official who appointed them to their job. To receive the exemption, employees must first advise their appointing official of the nature and circumstances of the particular matter in which they want to participate and make full disclosure of the financial interest involved. The appointing official may then decide whether to allow the person to participate or to have someone else handle the matter. Any such determination must be in writing with a copy available for public inspection at the city or town clerk's office.

This exemption is not available to *elected* municipal officials because they have no "appointing official." They must always abstain from participating in matters involving their own, their immediate family members' or their business' financial interest.

Example: A local businessman has asked for a zoning variance so that he may garage the trucks from his contracting business in an area zoned for residential use. One member of the zoning board of appeals lives adjacent to the lot which is the subject of the application for the variance. Because of the effect such a variance would have on the value of the member's property, he has a financial interest in the zoning board's decision. As a result, Section 19 prohibits him from participating in that decision unless he receives a written exemption from his appointing official. If the zoning board member is elected, he must abstain from participating. ▪

Example: The board of aldermen in a city must give final approval before a major condominium development may begin. One of the aldermen is a member of the board of directors of the development company seeking the approval. As a director of a business organization which has a financial interest in the board of aldermen's decision, this member is prohibited from participating in the decision. Because she is elected to her position as alderman, she has no appointing official and cannot take advantage of the "disclosure and authorization exemption" explained above. ▪

Example: A part-time secretarial position is available in the town treasurer's office. The *elected* treasurer may not hire his sister to fill the position, even if she is more qualified than other candidates and has taken the appropriate civil service examination. An *appointed* treasurer, however, may disclose the situation to his appointing authority (the board of selectmen) and the board may then authorize the treasurer to make the hiring decision. The board of selectmen may also assign the hiring decision to someone else or handle it themselves. ▪

Exemption 2

Determinations of General Policy

Certain decisions made by municipal officials affect either the municipality as a whole or a substantial segment of its population. The decision to raise water or sewer rates, for example, financially affects not only the water commissioner, but all town residents. A strict application of the conflict law in this circumstance would prohibit all town officials from participating in these decisions. This result would severely hinder the operation of a municipality. Therefore, Section 19 does not restrict one's participation in a particular matter if the issue involves a "determination of general policy" *and* the interest of the municipal employee or members of the employee's immediate family is shared with a substantial segment of the population of the municipality.

Exemption 3

Elected Official(s) Making Demand Bank Deposits

Section 19 allows an elected town or city official (e.g., the treasurer) to deposit municipal funds into a checking account in a bank with which the employee is affiliated *only if* the elected official first files with the clerk a statement making full disclosure that he or she is associated with the bank which has a financial interest in the deposits.

Example: The elected city treasurer is a member of the board of directors of a local bank. She opens and maintains a checking account in that bank with city money after filing a disclosure of her position on the board and the bank's interest in the deposit. She is not in violation of Section 19 because she has complied with the exemption. ▪

Using the Rule of Necessity

If a member of a town or city board has a conflict of interest, that member will be disqualified from acting on that board matter. In some cases, especially when more than one member is disqualified, a board cannot act because it does not have a quorum. (If a number for a quorum is *not* set by law, a quorum is generally a majority of the board members.) In these instances, the board may use what is called a Rule of Necessity to permit the participation of the disqualified member in order to make a quorum to allow the board to act.

The Rule of Necessity is not a law written and passed by the Legislature. Rather, the Rule of Necessity was developed because judges applied it in their court decisions.

The Rule of Necessity works in the following way:

1. It can only be used if a board is *unable* to act on a matter because it cannot obtain a quorum because members are disqualified from acting.

Example: A five member board has a meeting and all members are present. Three of the five members have conflicts. A quorum is three. The two members without conflicts do not make a quorum. The board cannot act. The Rule of Necessity will permit all members to participate. ▪

Example: A five member board has a meeting and four members are present (one member is sick at home). Two of the four present members have conflicts. A quorum is three. The one member who is sick at home does not have a conflict. The Rule of Necessity may not be used because there *is* a quorum of the board which is able to act. Because one member of that quorum is absent does not permit use of the Rule of Necessity. ▪

Example: A five member board has a meeting and all members are present. One member has a conflict and is disqualified. The vote is a two to two tie. The Rule of Necessity may not be used to break the tie. In general, a tie vote defeats the issue being voted on. ▪

2. The Rule of Necessity should be invoked by the chairman of the board, upon advice from town or city counsel. It is advisable for town or city counsel to set guidelines for exactly when and in what circumstances the Rule of Necessity should be invoked.

3. If it is proper for the Rule of Necessity to be used, it should be clearly indicated in the minutes of the meeting that the board was unable to obtain a quorum due to disqualification of members and, as a last resort, that those disqualified will now participate under the authority of the Rule of Necessity.

4. The Rule of Necessity may only be used as a last resort. Every effort must be made to find another board capable of acting in place of the board which could not obtain a quorum.

Misuse of Official Position
(Section 23)

Section 23, referred to in the law as the "Standards of Conduct," provides a general code of ethics for all public employees. The Standards of Conduct may apply whenever there is an overlap or direct connection between a public employee's official duties and responsibilities and his or her private activities, interests or relationships. This overlap of personal and public interests can at a minimum create an appearance of a conflict of interest.

A municipal agency or board may establish and enforce additional standards of conduct beyond those in the conflict law.

Unwarranted privileges

Municipal employees may not use or attempt to use their official positions to secure for themselves or others unwarranted privileges of substantial value. Substantial value has been set at $50 by the courts and the Commission.

Example: A city employee submits a request for reimbursement for travel expenses he said that he incurred in attending a conference. The employee did, in fact, attend the conference, but did not incur the full expenses for which he seeks reimbursement. This conduct violates the conflict law since it is an attempt by the employee to use his official position to secure an unwarranted privilege of substantial value for himself. ■

Example: A full-time employee in the mayor's office uses the office computer after hours to set up a data base for his wife's accounting business. This violates the conflict law. Using city equipment and resources for personal business is using an official position to obtain an unwarranted privilege of substantial value not similarly available to others. ■

"Appearances" of conflict

Public employees must avoid conduct which creates a reasonable impression that they will act with bias.

A public official can dispel this impression of favoritism by disclosing all the facts which would lead to such a conclusion. For example, it may be necessary for a public official to disclose a personal relationship with someone appearing before his or her board.

Appointed officials must disclose in writing to their appointing authority. This disclosure must be kept available for public inspection. An elected official's public disclosure must be made in writing and filed with the city or town clerk. In addition, officials would be well advised to make a verbal disclosure for inclusion in meeting minutes if such an "appearance" of a conflict arises in a public meeting. These public disclosures must be made *prior* to any official participation or action.

Once this public disclosure has been made, the official may participate in the matter notwithstanding the "appearance of a conflict." When officials act on matters affecting individuals with whom they have a private relationship, they must act objectively and be careful not to use their official position to secure any unwarranted privilege or benefit for that person. Use of an official position to secure an unwarranted privilege for someone is always prohibited, regardless of whether the disclosure procedure is followed.

Example: An elected planning board member participates in the planning board's consideration of a subdivision plan submitted by a contractor who built the planning board member's house. His participation in the planning board's consideration would create a reasonable basis for the impression that the contractor could unduly enjoy his favor in the performance of his official duties. To dispel this appearance of bias, the planning board member must disclose in writing his private relationship with the contractor and file the disclosure

with the town clerk. He may then vote on the subdivision plan (provided he can do so objectively). ▪

Example: The longtime friend of the chief of the town's highway department applies for a job in the highway department. If the chief gets involved in the hiring process, it may appear as though his friend could enjoy undue favoritism. To dispel the appearance of favoritism, the highway department chief must disclose his private relationship with the job applicant in writing to his appointing official (the board of selectmen) prior to any action. This disclosure must be available for public inspection. It is then within the authority of the board of selectmen to determine whether any further steps need to be taken to avoid the appearance of a conflict. ▪

Inherently incompatible activities

A municipal employee is prohibited from accepting other employment involving compensation of substantial value ($50 or more), the responsibilities of which are inherently incompatible with the responsibilities of his public office. For example, in a 1984 enforcement case, a state mediator admitted he violated the conflict law by working privately for a union when he was involved in mediating a labor dispute with the same union.

Use of confidential information

No current or *former* officer or employee of a municipal agency may:

1. accept employment or engage in any business or professional activity which will require the employee to disclose confidential information gained by reason of the employee's official position or authority; or

2. improperly disclose material or data which are not considered public records and which are acquired in the course of official duties nor use such information to further personal interests.

Example: A former employee of the town personnel office sets up her own employment placement service and uses confidential information from the town's personnel records to prepare a client list for use in her private business. This violates Section 23 because she would be using confidential information acquired in the course of official duties to further personal interests, and also because she would be using her official position to secure for herself an unwarranted privilege not properly available to similarly situated individuals (i.e., other placement services). ▪

Prohibited Appointments of Board and Commission Members (Section 21A)

The conflict law prohibits town or city board members from being *eligible* for appointment or election to any position under the supervision of their own board. This prohibition continues for thirty days from the member's termination of service on the board.

Only if town meeting approves, may a board member be appointed to a position under the supervision of the member's own board. Even if town meeting approves the appointment, Section 20 (discussed on page 16) may place restrictions on or prohibit the appointment.

Municipal officials considering applying for a paid position under the supervision of their own board should be aware that they may not participate as board members in discussions and/or votes concerning their appointment.

Example: A member of the board of assessors may not apply for and obtain a job in the assessor's office without town meeting's approval. If he resigns his membership on the board, he cannot apply for a job in the assessor's office for 30 days. He also is prohibited from being hired while a board member but technically not accepting the job for 30 days. ▪

Demanding Undated Resignations Prohibited (Section 21B)

The conflict law prohibits the mayor, city manager or town manager from requiring anyone, as a prerequisite to appointment to a municipal position, to submit an undated resignation. This prohibition prevents the chief executive officer of a municipality from using a municipal employee's undated resignation to exert unfair leverage over the employee and from dismissing an employee without the need for public explanation.

Restrictions on Partners of Municipal Employees (Section 18)

The law prohibits partners of municipal employees from deriving an unfair advantage as a result of their association with the municipal employee. Therefore, the partner of a municipal employee may not act as agent or attorney for a private party before the city or town in connection with a matter in which the municipal employee has ever participated or over which the employee has official responsibility.

Municipal employees are also prohibited from shifting to their partners what they themselves are prohibited from doing.

Example: A member of the planning board is a partner in a law firm. As a board member he has official responsibility for approving development plans. His law partners may not represent anyone other than the town before the board in connection with such an application. It does not matter if the board member takes no action on the application or disqualifies himself from that proceeding. ▪

Restrictions "After Hours"

Prohibited Municipal Contracts and Multiple Jobs (Section 20)

Application to Employees & Officials

In general, municipal employees are prohibited from having a direct or indirect financial interest in a "contract" with a municipal agency. Contracts include agreements to provide goods and services. Employment also constitutes a contract with the municipality. Therefore, generally, municipal employees are prohibited from holding more than one paid position or contracting with the same city or town. (However, the courts have said that election to public office is not a contractual relationship; therefore, municipal officials may hold any number of elected paid positions and not be in conflict.)

These restrictions will avoid any public perception that municipal employees have an "inside track" on getting municipal contracts and jobs.

Example: A full-time employee of the school department is half owner of a business which provides transportation for the handicapped. The employee will violate Section 20 if his business enters into a contract with the school department to transport handicapped students to and from school. ▪

Example: The town assessor works for a large data processing firm. The town's assessing department has asked her firm to computerize the town's assessment records. They enter into a contract to do so. The town assessor may continue to work for her firm, but she would be prohibited under Section 20 from working for the firm on the town assessment records project or from receiving any financial benefit from that contract. ▪

Example: A full-time police officer working nights may not take another full-time paid municipal job during the day. ▪

Municipal employees may qualify for one of the exemptions under Section 20 to allow them to contract or hold multiple positions with the town or city for which they work. A municipal employee must fulfill certain specific conditions before receiving an exemption. (See exemptions 1 through 9, starting on the following page.)

Note: Section 20 is the most complex section of the conflict law; we suggest you call the Commission or contact your city solicitor or town counsel for specific advice on Section 20.

Application to Spouses

A spouse's financial interest in a municipal contract is not necessarily attributed to the municipal employee. Therefore, if the spouse has a financial interest in a municipal contract this does not automatically place the municipal employee in violation of the law. However, a municipal employee will not avoid violating Section 20 merely by having the contract "technically" in a spouse's name while continuing to share in the contract proceeds.

Example: An employee of the police department (Jane) is married to the owner of an electronics store (Bob). Bob has a contract selling and leasing radio equipment to the police department. Jane does not, by law, have a financial interest in Bob's contracts simply because she is married to him. Therefore, Bob may have a contract with the town. However, if Jane were a partner or part-owner in her husband's store or if she exercised control over the management of the store, she would have a financial interest in the contracts. Her financial interest would prohibit the electronics store from contracting with the police department. ▪

Exemptions 1 through 9

There will be very few instances when employees will be able to contract or hold second jobs with their *own* agency. However, there will be instances where employees are allowed to contract or hold second jobs with *other* agencies.

Exemption 1.

The most comprehensive exemption is found in Section 20(b). It states that if you are a municipal employee, you may have a contract with a municipal agency *if*:

1. you do not work for the contracting agency;
2. you do not work for any agency which regulates the activities of the contracting agency;
3. you do not participate in or have official responsibility for the activities of the contracting agency;
4. the contract is made after public notice or competitive bidding; and
5. you file with the clerk a disclosure of your and your immediate family's financial interest in the contract.

Example: A full-time employee of the public works department owns a company which produces electrical equipment. He may sell lighting fixtures to the school department provided the contract is competitively bid or publicly advertised and he makes the necessary disclosure to the town clerk. However, if he worked for the school department (the contracting agency) or if the contract were not awarded after advertising or competitive bidding, he would violate the law by having such a contract. ▪

Example: A full-time employee of the purchasing department owns 25 percent of the stock in a cleaning supply company. If the purchasing department approves every purchase and contract made by every town agency, the employee will violate Section 20 if his corporation enters into a contract with any agency of the town to provide cleaning supplies. This violates the law because the full-time employee of the purchasing department is employed by an agency "which regulates the activities of the contracting agency." ▪

If the contract is for personal services (i.e., a second job) *in addition*, you must fulfill the following criteria:

1. the services must be provided outside the normal working hours of your primary job;
2. the services may not be required as part of your regular duties;
3. you may not be compensated for the second job for more than 500 hours in a calendar year;
4. the head of the contracting agency must file a written certification with the clerk that no employee of the contracting agency is available to perform those services as a part of his or her regular duties.

Example: A full-time secretary in the town clerk's office may contract with the licensing board to provide typing services, provided he does the work on his own time (e.g., nights or weekends); he does not bill the board for more than 500 hours in any one calendar year; he makes the necessary disclosure to the clerk; the board gives members of the general public the opportunity to seek the contract; and the head of the licensing board certifies that no one at the board is available to do the work. ▪

Exemption 2.

Special municipal employees may have a contract or a second job with the same city or town if the employee meets *one* of the following conditions:

1. the special municipal employee does not participate in or have official responsibility for any of the activities of the contracting agency, and files with the city or town clerk a statement disclosing the financial interest in the contract; or
2. the special municipal employee has filed with the city or town clerk a statement disclosing the interest in the contract *and* the

city council, board of selectmen or board of aldermen has approved his or her exemption from this section. This means that if a special municipal employee gets formal approval, that employee may have a financial interest in a contract with the agency he or she works for, e.g., a school committee member contracting with the school department.

Example: An engineer works part-time for the city's conservation commission and has been classified a special municipal employee. As a special, she may have a consulting contract with the highway department regarding road construction *if* she has filed with the city clerk a disclosure of her interest in the consulting contract. In addition, if she receives approval from the board of selectmen and files a disclosure statement, she may contract with the conservation commission (her own agency). ▪

Exemption 3.

Section 20 does not prohibit municipal employees from receiving benefits from programs funded by the United States or any other source in connection with the rental, improvement, or rehabilitation of their residence.

Example: A municipal employee who owns and resides in a home which qualifies for federal subsidies for home weatherization may obtain such a subsidy, even though the program is administered by, and the funds distributed by, a municipal agency of the same town in which she is employed. ▪

Exemption 4.

Section 20 does not prohibit a municipal employee from being eligible for a housing subsidy program administered by a local housing authority. However, the housing authority employee who has responsibility for the administration of the subsidy program may not be eligible for a subsidy.

Exemption 5.

Section 20 does not prohibit an individual who is already a municipal employee from also serving as selectman (or as councillor in a municipality with a town council form of government) in the same town as long as the selectman:

1. does not vote or act as selectman on any matter which is within the authority of the agency which employs the selectman or over which he or she has official responsibility (for example, a policeman who is elected as selectman may not vote on any matter which comes under the police department's authority); and

2. receives compensation for only one office or position in the town (individuals may choose which pay they wish to receive).

A selectman who does not hold a municipal position before being elected may not be appointed to a municipal position afterwards. In fact, once one's term as selectman expires or one resigns, there is a six month waiting period before being eligible to be appointed to a municipal position. However, a selectman may be routinely reappointed to a previously held position.

Example: A school teacher may serve as elected selectman so long as she does not vote or act on any matter which is within the authority of the school department, and she receives only one salary. Her original municipal teaching contract may be renewed. However, she is not eligible for promotion to the position of principal (considered a new appointment) while she is a selectman, or for six months after her term as selectman ends. After a selectman is elected, she may not be appointed to any new municipal position (e.g., be hired as a teacher) during her term as selectman or for six months after her term ends. ▪

Note: Selectmen designated as specials in towns with a population of under 5,000 may hold additional paid town positions if they meet the requirements detailed in Exemption 2 (page 17).

Exemption 6.

Section 20 does not prohibit an employee of a housing authority from serving in any elected position, except mayor, as long as the person:

1. does not vote or act on any matter within the purview of the housing authority; and

2. receives compensation for only one office or position in the municipality (individuals may choose which pay they wish to receive)

A city councillor, alderman or other elected official who did not work for a housing authority before being elected may not be appointed to a job in the housing authority afterward. In fact, once one's elected term expires or one resigns, there is a six month waiting period before being eligible to be appointed to such a position.

Exemption 7.

A *state* employee may hold a paid or unpaid elected or appointed office in a city or town. However, in the municipal position, an employee may not vote or act on any matter which comes under the authority of the state agency the employee works for or over which the employee has official responsibility. This exemption is found under Section 4 of the conflict law.

Example: A full-time employee of the State Department of Public Health (DPH) may not serve as a municipal health agent because every matter which he would be acting on as health agent would be within the purview of DPH. The DPH employee may serve as selectman but may not, as selectman, vote or act on any matter under the authority of DPH. ▪

Exemption 8.

A clerk of a city or town may hold additional municipal positions for compensation as long as this arrangement is not disapproved of by the selectmen, town meeting, town counsel (in a town) or mayor and city council (in a city). (See G.L. c. 41, §19I).

Exemption 9.

A municipal employee in a town with a population of less than 3,500 may hold more than one paid appointed position if the board of selectmen formally approve the additional appointments. The employees do not need to be designated as specials in communities with a population of less than 3,500.

Limits on Private Activities (Section 17)

Application to Municipal Employees

Section 17 limits what a municipal employee may do "on the side" for someone other than the city or town which the employee works for. A person cannot serve two masters; whenever an employee works for private interests in matters in which the city or town also has an interest, there is a potential for divided loyalties at the expense of the municipality. Therefore, Section 17 prohibits any municipal employee from:

1. acting as agent or attorney for a private party before city or town boards, or

2. being paid by a private party in relation to any "particular matter of direct and substantial interest" to the city or town. (See Glossary)

The term attorney applies to lawyers and may also include any person exercising a power of attorney. The term agent refers to anybody acting in a representative capacity on behalf of someone else, regardless of whether the person is a lawyer.

Section 17 also prohibits anyone from giving, promising or offering such compensation to a municipal employee.

With respect to this section, you should note at the outset:

1. Not all outside activity is prohibited, only outside activity which relates to particular matters of direct and substantial interest to the city or town. This outside activity is prohibited whether or not it benefits or is adverse to the city or town's interest.

2. The restriction applies as long as *any* municipal agency has a direct and substantial interest in the matter; it makes no difference whether the employee's own agency has the interest.

3. "Anyone other than the city or town or a municipal agency" includes private individuals or organizations, as well as other levels of government (state, county or federal).

4. Compensation includes not only money but also anything of value received for services rendered. For example, the opportunity to participate in an investment qualifies as compensation as would various fringe benefits. Reimbursements for expenses are not compensation.

5. Finally, when a municipal employee acts as agent or attorney for someone other than the city or town in connection with a particular matter of direct and substantial interest to the city or town, the employee violates Section 17 even if the services are unpaid.

Example: A full-time city engineer may not be paid by a developer to help prepare plans for a private development which will be presented to the city's planning board for approval. Although the city engineer does not work for the planning board, Section 17 would prevent him from performing such services, even on his own time. ▪

Example: A municipal employee serves in his off-duty hours as an unpaid trustee of a church in his town. The church and the town are negotiating a land exchange. If the employee represents the church in discussions with the town on this matter (the land exchange), he is acting as agent for the church in connection with a particular matter in which the town is a party. This is prohibited. ▪

Application to Special Municipal Employees

The conflict law imposes fewer restrictions on special municipal employees. Section 17 applies to special municipal employees only when there is a connection between the special municipal employee's outside activity and the employee's agency's work.

A special municipal employee may receive compensation from, or act as an agent or attorney for, someone other than the city or town *unless* the particular matter involved is one:

1. in which he or she participated at any time as a municipal employee or special municipal employee;

2. which is or has been (within the preceding year) the subject of the employee's official responsibility; or

3. which is pending in the municipal agency in which the employee is serving — if the employee serves more than 60 days in any 365 day period. To serve more than 60 days means to perform work on more than 60 days; work on any part of a day will be considered work for one full day. The employee is responsible for keeping accurate records in this regard.

Example: A computer programmer is hired by the city's school department as a part-time consultant. By virtue of this city consulting job, the programmer is a municipal employee; the city council has designated this position as a "special" position. A computer company which has a contract with the city's personnel office offers a job to the programmer to work on this contract. The programmer may work for the company because the contract with the personnel office is not a particular matter she participates in or has official responsibility for (in her school department position) and the matter is not pending in the school department for any type of action. ▪

Example: A nurse consults with a town board of health (BOH) for 45 days spread out over a year; her position has been designated as a special municipal employee position. Her work relates exclusively to the BOH lead-paint program. The nurse may also represent a community health center in a funding application before BOH because she does not have official responsibility for or participate in BOH funding decisions and she worked less than 60 days for BOH during the previous year. ■

Exemptions 1 through 5

Exemption 1.

If a municipal employee's job responsibilities require the employee to represent interests other than the municipality's, the employee does not violate Section 17. It is rare, however, that municipal employees are expected to represent outside interests before the town.

Example: The tenant representative on a local rent control board may act as spokesperson for tenant groups as part of his official duties. This would not violate the conflict law even though he is acting as their "agent." ■

Exemption 2.

A municipal employee may provide unpaid assistance to someone who is subject to employment discipline or other municipal personnel proceedings.

Exemption 3.

Appointed municipal employees may represent members of their immediate family or any person for whom the employees serve as a guardian, executor, administrator or other fiduciary before a town board or agency, so long as the employees do not participate in, and do not have responsibility over the matter involved. An employee's appointing authority must approve the arrangement in writing prior to any action.

Elected municipal officials may represent only themselves before town boards; they may not represent members of their immediate family.

Example: An elected or appointed zoning board of appeals member may personally seek a variance from the zoning board to build a garage next to his house. An appointed ZBA member may represent his father before the ZBA on a variance request, provided he receives permission from his appointing authority (i.e., the board of selectmen). An elected ZBA member may not represent his father under any circumstances. The ZBA member may not participate as a board member in the decision regarding his own or his father's petition. ■

Exemption 4.

A present or former *special* municipal employee may assist another person for compensation in working on a municipal contract, so long as the head of his or her agency certifies in writing that "the interest of the city or town requires such aid or assistance," and the certification has been filed with the city or town clerk.

Exemption 5.

A municipal employee may give testimony under oath or sworn statements and receive witness fees from one other than the city.

Exemption 6.

A municipal employee who is not employed by and does not provide services to a permit-granting agency and who does not work for an agency that regulates the activities of the permit-granting agency may apply on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit from that agency. He may also receive compensation in relation to the permit.

Restrictions After You Leave Government Service

Misuse of Government Connections (Section 18)

Former municipal employees may not use their past friendships and associations within government, or use confidential information obtained while serving the government, to derive unfair advantages for themselves or others. The law does not prohibit a municipal employee from using general expertise which he or she developed while a municipal employee; rather, the law limits what actions a former city employee may take regarding individual decisions or other "particular matters" in which the employee actually participated or over which he or she had official responsibility while a municipal employee. (The prohibition against using confidential information is contained in Section 23, page 14.)

The law also applies to the business partners of former municipal employees. Former municipal employees may not shift to their partners what they themselves are prohibited from doing. In addition, the law prohibits partners from deriving an unfair advantage as a result of their association with a former municipal employee.

Application to Former Municipal Employees

1. *Forever Ban*

If a municipal employee participated in a "particular matter" as a municipal employee he or she may *never* become involved in that same matter after leaving municipal service except on behalf of the city or town.

Specifically, the law states that a former municipal employee may not act as agent or attorney for, or receive compensation directly or indirectly from, anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest *and* in which he or she participated as a municipal employee.

Example: A member of the zoning board of appeals votes to deny a special zoning permit to a person who wants to put a second floor on a convenience store in violation of height restrictions. After his term on the board expires the board member who is a lawyer is asked to represent the store owner in a suit against the board challenging its permit denial. Because he participated as a board member in the permit denial, he may not act as the attorney in the lawsuit. ▪

Example: The superintendent of a municipal public works department selects a contractor to do sewer reconstruction work in the town. Shortly afterward, he resigns his superintendent position and is hired by the contractor to act as foreman on the work under the town sewer contract. The law prohibits him from accepting this employment because he participated in the award of that contract while a municipal employee. However, the superintendent may work for the contractor on other jobs in which he did not participate as a municipal employee. The superintendent may also, in the future, work on a town contract he had no responsibility for and did not participate in as a municipal employee. ▪

2. *One Year "Appearance" Ban*

The law also restricts the actions of a town or city employee who had official responsibility for a matter even though the employee did not personally participate in it. After an official leaves municipal service, for one year, he or she may not appear before any municipal agency on behalf of a private party if:

1. the appearance is in connection with a particular matter in which the municipality has a direct and substantial interest; *and*

2. the matter was within the employee's official responsibility within the two-year period before leaving municipal service. Note that this prohibition lasts for only one year, and restricts only appearances (whether paid or unpaid) before municipal agencies.

Example: The chairman of a local liquor licensing board had official responsibility over all license applications submitted to the board. For one year after leaving the board, the member may not appear on behalf of an applicant for a liquor license if that application was before the board at any time during the last two years of his service. This prohibition exists even if the member personally took no action on the case. If he had taken some action he may never represent the applicant on that particular application. He may, however, represent the applicant on a new liquor license application. ▪

Example: An employee of a city's building department is assigned by his supervisor to inspect a newly-constructed building for local building code violations. The law prohibits that employee from ever being paid by the building's owner in relation to that inspection, e.g., to perform required repairs. Although the *supervisor* does not personally make the inspection, for one year after she leaves municipal service she is prohibited from appearing on behalf of the building owner before a municipal agency in connection with the inspection. ▪

Application to Business Partners of Former Municipal Employees

The partner of a *former* municipal employee is restricted for one year after the former municipal employee leaves municipal service from personally representing or being paid by a private party in connection with a matter that the former municipal employee participated in as a public employee.

Example: A member of the planning board is a partner in a law firm. When the planning board member's term expires, she is forever prohibited from representing private clients in connection with applications in which she had actually participated as a board member. Her partners may not, for one year after the planning board member leaves the board, represent anyone (except the town) in connection with matters in which the former board member participated. ▪

Example: Three contractors do not have a formal partnership agreement, but share office space, common expenses and advertising and work together and share profits on some projects. Because they would reasonably appear to be partners to an outsider, the three contractors will be treated as partners for purposes of the conflict law. Accordingly, if one of the contractors is a former municipal employee, the other two will be prohibited for one year after the municipal employee/partner leaves municipal service from working on any matter in which the former municipal employee participated while serving town government. ▪

If a partner of a former municipal employee is also a member of another partnership in which the former employee has no interest, there are no restrictions on the activities of the latter partnership.

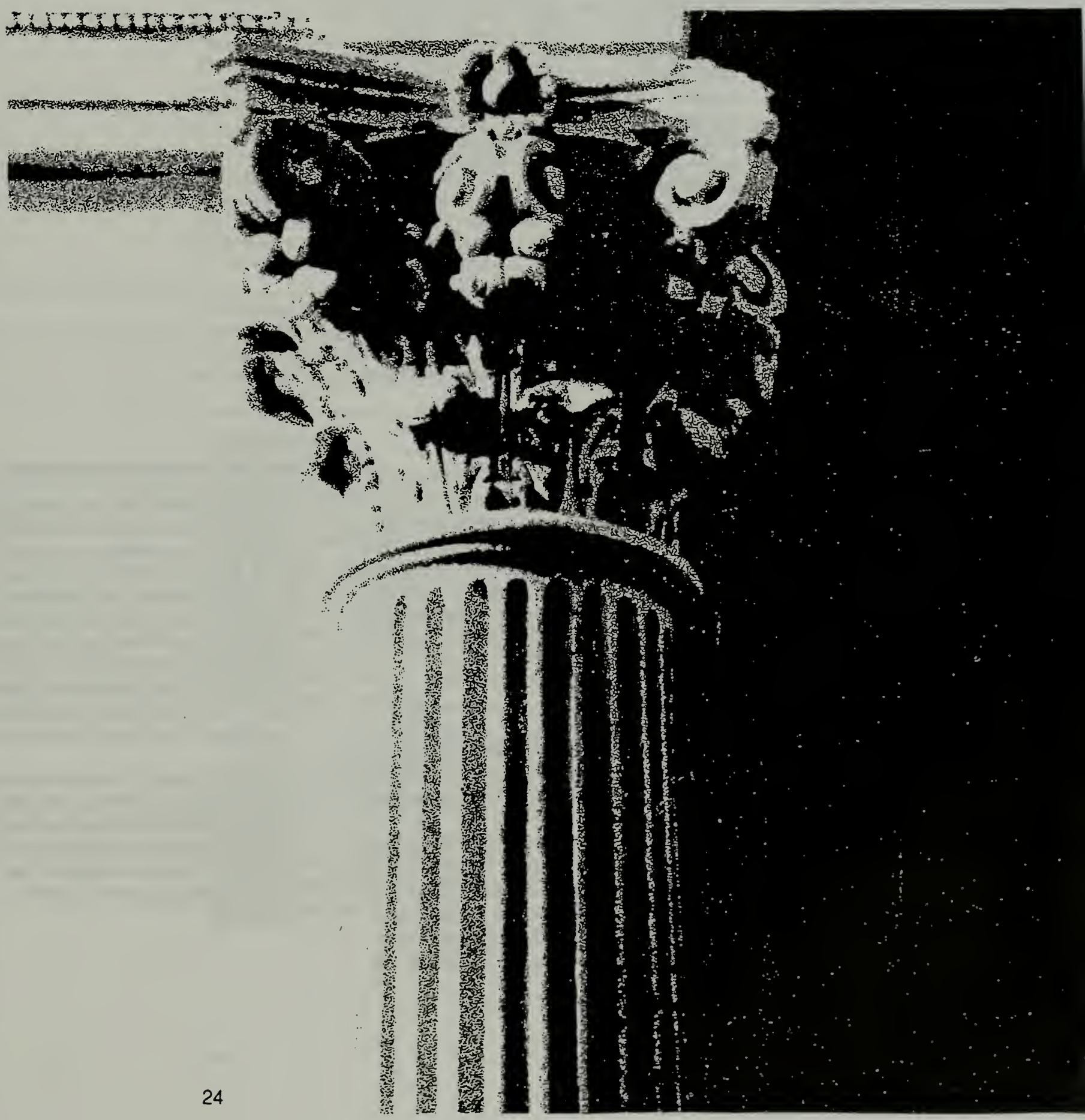
Example: A former member of the board of assessors may not be compensated by anyone other than the town in connection with any assessment decisions in which he participated. The former board member is in a real estate partnership. His partner, Jones, is also a partner in a law firm. The law firm may represent a client challenging an assessment made by the former board member so long as Jones takes no part in the law firm's activities challenging the assessment. ▪

Application to Former Town Counsel

A former town counsel who was paid less than $2,000 per year on a salary or retainer may not represent a private party before any municipal agency *only* in connection with particular matters in which he participated as a municipal lawyer. These former town and city lawyers may appear before municipal agencies regarding particular matters over which they had official responsibility but did not personally participate.

Former town counsels who were paid more than $2,000 a year must abide by the same restrictions outlined on page 22 for former municipal employees.

Appendix



How to Obtain Legal Advice

You may call the State Ethics Commission's Legal Division at (617) 727-0060 for informal, confidential advice on the conflict law, or you may seek a written advisory opinion from your city solicitor or town counsel or from the Ethics Commission. If you have a question about your own activities, we urge you to request an opinion *prior* to engaging in the activity in question. Requests to the Commission for an advisory opinion must be in writing and must be about a real, not hypothetical, situation which presents a problem under the conflict of interest law.

Investigations

How to File a Complaint

Anyone can file a complaint concerning a conflict of interest — in person, over the phone or by letter. The law requires the Ethics Commission to keep the identity of all complainants confidential and the Commission's enabling statute (M.G.L. c. 268B, §8) protects a complainant from retribution for filing a complaint with the Commission.

The Commission can initiate investigations based on these complaints, on referrals from other civil and criminal enforcement agencies or on its own based on information obtained through other sources, such as news reports.

If you believe that a violation of the conflict of interest law has occurred or is occurring, you may call or visit the State Ethics Commission office at Room 619, One Ashburton Place, Boston, (617) 727-0060, and speak with a member of the Commission's enforcement staff.

Investigation Procedures

The Enforcement Division reviews each complaint received. If the complaint falls within the Commission's jurisdiction, an initial "screening" is done to determine if the facts warrant a formal investigation. The screening is an informal fact gathering stage. Many enforcement cases end confidentially at the conclusion of the screening with a private educational letter sent to the subject of the investigation. In these cases, no formal charge of a violation is brought and the matter remains confidential.

After the screening, if the staff determines a case should be formally investigated, authorization is sought from the appointed Commissioners to conduct a Preliminary Inquiry. During this formal investigation the Commission staff has subpoena powers for testimony under oath.

After the investigation is conducted, the Commissioners vote on whether "reasonable cause" exists to believe that the law has been violated. If the Commissioners find "reasonable cause," the subject of the complaint is entitled to a public hearing before the Commission to present evidence and testimony on his or her own behalf. At the conclusion of a public hearing the Commissioners issue a Decision and Order stating whether there was a violation of the conflict law and what fine, if any, will be assessed. A person has the right to appeal the Commission's decision directly to Superior Court. In the alternative, the person may settle the case by admitting publicly that he or she violated the law and agreeing to pay a civil penalty for each violation.

If the Commission finds "no reasonable cause" to believe the law has been violated, the case is closed and records and proceedings of the investigation remain confidential.

Penalties

The Commission is authorized to impose civil fines of up to $2,000 per violation of the conflict law. In addition, the Commission may bring a civil action against individuals who have acted to their economic advantage in violation of the law, and may recover on behalf of the commonwealth or a municipality, damages in the amount of the economic advantage or $500, whichever is greater. In certain circumstances, the Commission may also recover multiple damages.

Further, any violation which has substantially influenced an action taken by a municipal agency is grounds to avoid, rescind or cancel that action. For example, if a zoning board approved a variance to allow a hotel to be built and one of the members was in conflict when he voted, the approval of the variance could be rescinded.

The conflict law also carries criminal penalties including fines and terms of imprisonment. Criminal prosecutions under the law are the responsibility of the Attorney General and District Attorneys. The Ethics Commission has the authority to refer cases to or concurrently investigate cases with these other law enforcement agencies.

Statute of Limitations

In general, the Ethics Commission will review cases which are not more than six years old. The Commission has established rules governing the Statute of Limitations. These rules state that the Statute of Limitations begins on the date that the Ethics Commission (or another law enforcement agency, such as the District Attorney) learns about an alleged violation of the conflict law. This is usually the date when someone makes a complaint. The Ethics Commission has three years from the date it learns of an alleged violation to issue an Order to Show Cause which starts public proceedings against an individual.

An Order to Show Cause may not be issued more than six years after the alleged violation occurred. Therefore, if a municipal official violated the law in 1980, if the Ethics Commission did not learn of the violation until 1988, the Commission could not take any action against the official.

Public Education

Public education has been a primary commitment of the State Ethics Commission since its establishment in 1978.

The Public Education Division conducts seminars for municipal employees and officials to help avoid potential conflicts which may arise between an employee's private interests and public position. The Commission staff will travel anywhere in the state to conduct a seminar tailored to any group of public employees or citizens.

The goal of the presentation and question and answer period is to provide an understanding of the basic principles of the law and how to comply with it by discussing "real life" conflicts that arise on the job.

Some of the topics covered at our seminars include: restrictions on receiving gifts, outside employment, contracting with municipal agencies, acting on matters which financially affect family members and business associates, holding more than one town job, and leaving the government to work for companies you dealt with as a public employee.

To arrange for a seminar on the conflict law, call (617) 727-0060 and ask for the Director of Public Education.

The Public Education Division also provides other publications free of charge or for a nominal fee including: the Commission's newsletter, *The Bulletin*; pamphlets for state, county and municipal employees on the conflict of interest and financial disclosure laws; a yearly compilation of Enforcement Actions and Advisory Opinions; an Annual Report and advisories and fact sheets which provide specific guidance to public officials on various aspects of the conflict law.

Commissions or Agencies Which Oversee Ethical Conduct

The following is a list of agencies which oversee the ethical conduct of public employees, including judges and legislators, as well as private sector lawyers. These agencies are responsible for interpreting and/or enforcing the statutes and regulations which are noted.

Massachusetts Municipal, County and State Employees:

State Ethics Commission
One Ashburton Place
Room 619
Boston, MA 02108
(617) 727-0060

M.G.L. c. 268A and c. 268B.

Federal Employees:

Federal agencies have a designated "ethics in government officer" who handles questions and refers complaints to the appropriate law enforcement agency concerning the federal conflict of interest statute. You may also contact the Inspector General's office within each federal agency for advice and information. In addition, the Office of Government Ethics (202-632-7642) will handle questions of a general nature.

Federal employees are covered by:

1. The Ethics in Government Act of 1978, Public Law 95-521.
2. Executive Order 11222 issued 5/21/65 (Standards of Ethical Conduct for Executive Agency Personnel).
3. Code of Federal Regulations 5 CFR 735.101 to 735.306 (Regulations promulgated by the Office of Government Ethics).

Judges:

Commission on Judicial Conduct
14 Beacon Street
Suite 102
Boston, MA 02108
(617) 725-8050

(Rule 3:09 of the Rules of the Supreme Judicial Court Code of Judicial Conduct.)

Judges, as state employees, are also covered by the conflict of interest law enforced by the State Ethics Commission.

Legislators:

House Ethics Committee
State House, Room 163
Boston, MA 02133
(617) 722-2040

House Rules 16 and 16A.

Senate Ethics Committee
State House, Room 517
Boston, MA 02133
(617) 722-1544

Senate Rules 10, 10A, and 12A.

Legislators, as state employees, are also covered by the conflict of interest law enforced by the State Ethics Commission.

Private Sector Lawyers:

Massachusetts Board of Bar Overseers
75 Federal Street
Boston, MA 02210
(617) 357-1860

Rule 3:01 of the Rules of the Supreme Judicial Court.

For information on:

Campaign and Fundraising Activities

Office of Campaign & Political Finance
One Ashburton Place
Room 411
Boston, MA 02108
(617)727-8352

M.G.L. c. 55.

Open Meeting Law

Contact your local District Attorney's Office

M.G.L. c. 30A §§11A, 11A 1/2, 11B and 11C; c. 34 §9; c. 39 §§23A, 23B and 23C

Public Records

Public Records Division
Secretary of State's Office
One Ashburton Place
Room 1701
Boston, MA 02108
617-727-2832

Glossary

This Glossary contains the definitions of those terms which are defined in the conflict law. They are designated with an asterisk.* In addition, we have given the ordinary meaning of terms used in this Guide which the conflict law does not specifically define.

Agent: anybody acting in a representative capacity on behalf of someone else, regardless of whether the person is a lawyer.

Attorney: a lawyer; any person exercising a power of attorney.

Business Organization: business companies and agencies such as sole proprietorships, corporations, partnerships, and trusts; also includes non-profit corporations, associations and municipalities.

***Compensation:** any money, thing of value or economic benefit conferred on or received by any person or entity in return for services rendered or to be rendered by himself or another.

***Competitive bidding:** all bidding, where the same may be prescribed by applicable sections of the General Laws or otherwise, given and tendered to a state, county or municipal agency in response to an open solicitation of bids from the general public by public announcement or public advertising, where the contract is awarded to the lowest responsible bidder.

Contract: any type of agreement or arrangement between two or more parties where each undertakes certain obligations in consideration of the promises made by the other(s); for example, construction or consulting contracts, employment arrangements, contracts for the sale of goods or to provide services, grants awarded by the city or town to individuals or corporations, and agreements between a municipal agency and a state agency.

***Immediate family:** the employee and his spouse, and their parents, children, brothers and sisters.
Note: Cousins, nephews, aunts, uncles, etc. are *not* considered immediate family members. Also, under the definition of immediate family, some brothers-in-law are immediate family, others are not; if your brother-in-law is your spouse's brother — he is immediate family *but* if he is your sister's husband, he is not immediate family for purposes of the conflict law.

***Municipal agency:** any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.

***Municipal employee:** a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

***Official act:** any decision or action in a particular matter or in the enactment of legislation.

***Official Responsibility:** the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

Note: Many special municipal employees, including most consultants, have responsibility over only the specific project for which they were hired. On the other hand, members of boards or commissions are often special municipal employees but will normally have "official responsibility" for every matter which is pending in their agency.

* **Participate:** participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

* **Particular matter:** any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but *excluding* 1. enactment of general legislation by the general court, and 2. petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

While the enactment of general legislation is not included in the definition of particular matter, the term does cover enactment of special legislation. Special laws are those directed at a specific situation or individual or entity — for example, a law exempting a specifically identified parcel of land from local zoning restrictions. General laws, in contrast, usually establish a rule of future conduct applicable on a wider scale of people or things and apply uniformly to all individuals similarly situated.

Particular matter of direct and substantial interest to a city or town includes: 1) All particular matters which affect the financial interests of the city or town — for example, contracts, grants and determinations of local tax liability (e.g., property, excise); 2) any city or town regulatory or adjudicatory proceeding such as permits, applications, licensing, zoning, eminent domain or assessment proceedings; 3) civil litigation involving a city, town or municipal agency as a party (but not a lawsuit between two private parties where the city or town is not involved even though that lawsuit is pending in a state court); and 4) decisions about the use of municipal property and funds.

Partner: Any person who joins with any other person(s) formally or informally in a common business venture. The term is not restricted to those who enter into formal partnership agreements. The following criteria are examined to determine if a partnership exists: whether the person shares in the advantages or risks of ownership, contributes to capital or operating expenses, owns a transferable interest in the assets of the entity, or reasonably appears as having a stake in the ownership of the business to an objective third person. In addition, if a group creates the public appearance of a partnership (for example, by using joint stationery, business cards, and business listings), the group will be treated as a partnership even though profits may not be shared.

* **Person who has been selected:** any person who has been nominated or appointed to be a municipal employee or has been officially informed that he will be so nominated or appointed.

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The State Ethics Commission
One Ashburton Place
Room 619
Boston, MA 02108
(617) 727-0060

The Commonwealth of Massachusetts
State Ethics Commission

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Telephone: (617)727-0060, (888)485-4766
Fax: (617) 723-5851
Web: jttp://www.state.ma.us/ethics

EDUCATIONAL MATERIALS LIST

for State, County and Municipal Employees and Officials

FACT SHEETS

1. Avoiding "Appearances" of Conflicts of Interests
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3. Guidelines for Municipal Officials Voting on Budgets
4. "Special" Municipal Employees
5. The Rule of Necessity
6. Municipal Officials: Don't Vote on Matters Affecting Abutting or Nearby Property
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3. The Appointment of Municipal Officials to Positions Supervised by Their Own Boards
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7. Withdrawn
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13A. Agency Part A: Municipal Employees Acting as Agent
13B. Agency Part B: State Employees Acting as Agent
13C. Agency Part C: County Employees Acting as Agent

14. Negotiation For Prospective Employment
15. Summary of Commission Advisories

98-1[1] The Conflict Law and Legislators' Private Employment

OTHER

M.G.L. 268A - The Conflict of Interest Law
M.G.L. 268B - The Financial Disclosure Law and State Ethics Commission Enabling Statute
930 CMR: State Ethics Commission Enforcement Procedures
Rulings (note: there is a fee attached to this item)
A Practical Guide to the Conflict of Interest Law and Financial Disclosure Law for State Employees
A Practical Guide to the Conflict of Interest Law for Municipal Employees
A Practical Guide to the Conflict of Interest Law for Police Officers
Introduction To The Conflict Of Interest Law (pamphlet)
An Introduction To The Conflict Of Interest Law For The Private Sector (pamphlet)
Guide to the Conflict of Interest Law for County Employees (pamphlet)
Guide to the Conflict of Interest Law for Municipal Employees (pamphlet)
Guide to the Conflict of Interest Law for State Employees (pamphlet)
Annual Report
Bulletin
Educational Materials List
Conflict of Interest Seminar Description

Issued: July 29, 1999

[1/]Beginning in May, 1998, the Commission changed its system for numbering future advisories. Advisories are now numbered according to the year they are issued, followed by a sequential number. Cite Advisories as follows: *EC-ADV-98-(number)*.

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SUMMARY OF THE CONFLICT OF INTEREST LAW - NO. 3

MUNICIPAL MANAGERS

The conflict of interest law (Chapter 268A) covers all municipal employees, whether elected or appointed, full or part-time, paid or unpaid. The law also regulates the activities of former employees and partners of current and former employees.

The purpose of the conflict law is to ensure that your private interests do not conflict with your public obligations. The law is broadly written to prevent you from becoming involved in a situation which could result in a conflict -- or even give the appearance of a conflict.

The following is a summary of the six sections of the conflict law which cover all municipal employees. Specific examples are provided for municipal managers.

Prohibited Actions Affecting Financial Interests (Section 19).

The law recognizes that your objectivity can be compromised when you act on matters in which you -- or a family member or close business associate -- have a financial stake. To discourage "self-dealing", the law prohibits you from participating in a particular matter in which you or any of the following have a financial interest:

your immediate family;
your partner(s);
a business organization in which you serve as an employee, officer, director, trustee or partner (including a non-profit organization);
and any person or organization with whom you are negotiating or have any arrangement concerning prospective employment.

For example, as a municipal manager you should not award a contract to your brother's company nor should you act on competing applications. You are also prohibited from participating in any discussion or recommendations to the Board of Selectmen or City council on contracts or other matters affecting your immediate family members.

In a 1982 enforcement case, the Commission found an executive director of a local Housing Authority in violation of this section of the law by participating in his agency's decisions to deposit funds in a credit union of which he served as director.

A "particular matter" is defined by statute to include almost any proceeding, application, request for determination, contract, claim, finding, decision or controversy which might come before you. The definition refers to specific matters and proceedings rather than general issues.

Section 19 does not apply if the particular matter involves a determination of general policy and your interest is shared with a substantial segment of the population of the town. Setting local water or sewer rates, for example, would fall under the exemption of general policy.

There is another exemption under Section 19 available to appointed municipal employees including municipal managers. You may act on a matter in which you, a family member or your business has a financial interest, provided that you receive written permission from your appointing authority prior to taking any action. For example, the law prohibits you from hiring your sister or participating in any salary matters concerning your sister (including union negotiations). But if you receive written permission before you take any action affecting your sister's financial interest, you may participate despite the conflict.

Prohibited Financial Interest In Municipal Contracts & Multiple Jobs (Section 20)

In general, Section 20 prohibits a municipal employee from holding more than one paid town position and having a financial interest in a contract with the municipality. For example, if you have responsibility over approving town expenditures and contracts, you are prohibited from having a financial interest in a contract with any town agency.

There are a number of exemptions to this general rule (available mostly for part-time employees), which cannot adequately be explained in this summary of the law. Please be sure to ask the Ethics Commission or your town or city counsel for advice concerning Section 20.

Restrictions After Hours (Section 17)

The law limits what you may do for someone other than the municipality you work for -- in other words what you may do on the side. This section is designed to protect the municipal employee and municipality from the problems resulting when people "serve two masters."

While you are a municipal employee, you cannot act as agent or attorney for a private party before the town, even if you are not paid. Similarly, you cannot be compensated by a private party in relation to any "particular matter" in which any agency of the same municipality is a party or has a direct and substantial interest.

For example, if you were a lawyer in private practice, being a full-time manager would preclude you from representing a client before any municipal agency. In addition, if you had an ownership interest in a development company, you could not represent your company before town boards.

The Commission in September 1982 found a selectman in violation of this section by acting as the agent for a private party in connection with the sale of property which was the subject of foreclosure proceedings by his town. The selectman paid a $1,000 civil penalty for the violation.

The law also restricts the activities of business partners of municipal employees. Your partner may not act as agent or attorney for anyone other than your town in connection with a particular matter in which you participate or which is subject to your official responsibility. For

example, your business partner could not act as agent for any applicant of a contract which has to be negotiated through your office.

Misuse Of Official Position (Section 23)

The Standards of Conduct provide a general code of ethics for all public employees.

The conflict law prohibits you from using or attempting to use your official position to secure an unwarranted privilege or from giving a reasonable basis for the impression that you can be improperly influenced in the performance of your official duties. The law also prohibits you from disclosing confidential information obtained on the job and from accepting outside employment which will impair your independence of judgement in the exercise of your official duties.

In a 1982 case the Commission found Lowell's city manager to have violated Section 23 by asking a developer whose hotel project was under consideration by the city to make arrangements for his Florida vacation and by accepting "VIP" treatment and direct billing privileges from the developer's Florida hotel. The Commission found the city manager, by his actions, to have given the developer the impression that he could be improperly influenced in the performance of his official duties.

In another case in 1983, the Commission found a selectman to have violated this section of the law by accepting golfing privileges at a local golf club extended to him because he was a selectman. Other example of violations include running a private business out of your public office, and using town resources such as stationery, phones and copiers for political campaigns.

Restrictions On Accepting Gifts (Section 3)

Extra payments, gifts or privileges offered because of (but not necessarily to influence) your official actions are prohibited. In other words, it is illegal to request or accept anything of "substantial value" for anyone with whom you have had or are likely to have official dealings (absent some family or social relationship which otherwise explains the gift) even if the motivation for the gift is to express gratitude for a job well done or to foster goodwill. The courts and the Commission have deemed "substantial value" to be $50 or more, in most cases. Some state and municipal agencies have implemented a stricter standard which prohibits receiving gifts of any kind.

In February 1983, the Commission found a Stoneham selectman to have violated this section of the law by receiving financial assistance, in the form of loans and loan guarantees, from a developer whose site plans were subject to approval by the board of selectmen. The selectman paid a civil penalty of $1,000 and an additional $900 forfeiture of the economic advantage he gained as a result of the violation.

Restrictions After You Leave Government Service (Section 18)

The conflict law aims to prevent the "revolving door syndrome". It prohibits former employees from deriving unfair advantages by improperly using friendships and associations formed or confidential information obtained while serving the government. The law is not designed to prevent you from using general expertise developed while a municipal employee. Rather, it focuses on particular matters you worked on while a municipal manager.

If you participated in a particular matter as a municipal manager you can never become involved in that same matter for a private party after you leave municipal service. If you had official responsibility for a particular matter as manager, even if you did not actually participate in it, you may not appear personally before any municipal agency on behalf of a private party in connection with that matter for one year after leaving government.

For example, if you negotiated a contract with a computer company to provide computer services for your town, you cannot leave town government and work for the company on the same contract you had responsibility for; you can, however, work for that company on other projects and you could also work for the company on town contracts proposed and awarded after you left your position.

"Special Municipal Employee" Designation (Sections 17 and 20)

For your information, some municipal employees can be designated as "special municipal employees" by the board of selectmen or city council. By virtue of this designation, sections 17 and 20 of the law apply less restrictively.

An employee may be designated on formal vote by the board of selectmen or city council at any time as a special municipal employee provided:

1. the employee is not paid; or
2. he holds a part-time position which allows him to engage in other employment during normal working hours; or
3. he was not paid by the municipality for more than 800 hours during the preceding 365 days.

All employees holding the same office or position must be treated equally -- having the same classification as special municipal employee. For example, if one member of a school committee is classified as a special, all members should be so classified. Typically, the "special" category would include members of boards and commissions or individuals serving part-time on a consultant basis. Municipal managers, as full-time professional administrators, are not eligible for designation as "special municipal employees."

Advisory Opinion

This summary presents a brief overview of the conflict law and suggests activities which you, as a municipal manager, must avoid. It is not a comprehensive review. You may call the Ethics Commission's Legal Division at 727-0060 for particular advice on the conflict law, as well

as seek an advisory opinion from your town or city counsel. As of April 1986, the Commission regularly reviews town counsel opinions on the conflict law.

If you have a question about your own activities, we urge you to request an opinion from your local counsel or directly from the Commission prior to engaging in the activity in question.

If you have questions about others' activities in your town or city, urge them to use our opinion process or seek advice from the town or city counsel. In addition, complaints may be filed with our Enforcement Division in person, by phone (at the same number listed above) or by letter. The identity of complainants is kept confidential.

ISSUED: May 26, 1987

Commonwealth of Massachusetts
STATE ETHICS COMMISSION
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Boston, Massachusetts 02108-1501

COMMISSION FACT SHEET NO. 1

AVOIDING "APPEARANCES" OF CONFLICTS OF INTERESTS STANDARDS OF CONDUCT (Section 23)

The appearance of a conflict of interest will often be created when a public employee's personal interests or relationships overlap with his or her public obligations. The Standards of Conduct (section 23 of the conflict law) provides a general code of ethics for all public employees and officials when faced with this overlap of private interests and official responsibilities.

This fact sheet explains the provisions of the Standards of Conduct.

I. UNWARRANTED PRIVILEGES

Municipal officials or employees are prohibited from using or attempting to use their official positions to secure for themselves or others unwarranted privileges of substantial value that are not properly available to similarly situated individuals. "Substantial value" has been set at $50 or more by the courts and the Ethics Commission. "Similarly situated individuals" means, in various situations, other people, businesses or other entities in the city, town, state, or county who are not necessarily public employees.

Example: A city employee submits a request for reimbursement for travel expenses he said that he incurred in attending a conference. The employee did, in fact, attend the conference, but did not incur the full expenses for which he seeks reimbursement. This conduct would violate the conflict law since it is an attempt to use his official position to secure an unwarranted privilege of substantial value for himself.

Example: A full-time employee in the Mayor's Office uses the office computer after hours to set up a data base for his wife's accounting business. This violates the conflict law. Using city equipment and resources for personal business is using an official position to obtain an unwarranted privilege of substantial value not properly available to others.

II. "APPEARANCES" OF CONFLICTS

Public officials and employees must avoid conduct that creates a reasonable impression that any person can improperly influence or unduly enjoy their official favor, or that they are likely to act (or fail to act) because of kinship, rank, position or undue influence by any party or person. A reasonable impression of favoritism or bias may arise when a public official acts on matters affecting a friend's, a business associate's or a relative's financial interest.

Current state law allows public officials to act on matters, even if it creates the appearance of a conflict, if they openly admit all the facts surrounding the appearance of bias prior to any official action. (Prior to April, 1986, when section 23 was amended by the Legislature, if there was an "appearance" of a conflict, it automatically constituted a conflict of interest mandating that the public official abstain from acting on the matter.)

Specifically, the law now states that if a reasonable person having knowledge of the relevant circumstances would conclude that a public official or employee could be improperly influenced, the public employee can dispel this impression of favoritism by disclosing all the facts that would lead to such a conclusion. For example, it may be necessary for a public official to disclose a personal relationship with someone appearing before his or her board.

Appointed officials must make such disclosures in writing to their appointing authority (the person or board who appointed them to their job). This disclosure must be kept available for public inspection. An elected official's public disclosure must be made in writing and filed with the city or town clerk. These public disclosures must be made prior to any official participation or action. In addition, if an appearance of a conflict of interest arises in a public meeting, officials would be well advised to make an oral disclosure for inclusion in meeting minutes.

Once a public disclosure has been made, the official may participate in the matter notwithstanding the "appearance" of a conflict. When officials do act on matters affecting individuals with whom they have a private relationship, they must act objectively and be careful not to use their official position to secure any unwarranted privilege or benefit for that person.

NOTE: The conflict law (in sections 6, 11 and 19) expressly prohibits public officials from acting on any matter that affects the financial interest of themselves, their immediate family members or businesses for which they serve as employee, partner, officer, director or trustee. "Immediate family" is defined in the law as the employee and his or her spouse and each of their parents, children, brothers and sisters. The public disclosure process is not available for elected public officials when faced with matters affecting this group -- they simply must abstain from participating in the matter. Public officials who are appointed or hired to their jobs should contact the Ethics Commission or consult the agency's "Advisory No. 11 - Nepotism" before taking any action on such matters.

Example: An elected planning board member participates in the planning board's consideration of a subdivision plan submitted by a contractor who previously built the planning board member's house. Her participation in the planning board's consideration would create a reasonable basis for the impression that the contractor could unduly enjoy the planning board member's favor in the performance of her official duties. To dispel this appearance of bias, the planning board member must disclose in writing her private relationship with the contractor and file the disclosure with the town clerk. She may then vote on the subdivision plan.

Example: The longtime friend of the chief of the town's Highway Department applies for a job in the Highway Department. If the chief gets involved in the hiring process, it may appear as though he would be biased in favor of his friend. To dispel the appearance of favoritism, the Highway Department chief must disclose his private relationship with the job applicant in writing to his appointing official (the Board of Selectmen). The Board of Selectmen may determine that further steps should be taken to avoid the appearance of a conflict (e.g., instruct the Highway Department Chief not to participate in the hiring).

III. DEALINGS WITH SUBORDINATES

The inherently exploitable nature of the relationship between superior and subordinate requires formalized safeguards to protect against even accidental coercion or undue pressure on the part of the superior. Section 23 of the conflict law prohibits both actual exertion of undue influence and also the appearance of acting in anything but a completely objective manner. Therefore, persons in supervisory positions cannot ask their subordinates to work for them in a private capacity, nor can they ask subordinates to contribute to any private interest or organization. The subordinate employee may feel coerced even if there is no such intent, and it would be impossible to avoid the "appearance" of impropriety in such situations. The limitations of section 23 also apply to public employees' dealings with vendors and other individuals the employees regulate.

Example: You are doing substantial renovations on your home, and you know that your administrative assistant and his brother do roofing work on the side. You cannot ask your assistant to re-shingle your roof, even if you are willing to pay a fair market wage for the work.

If, however, the solicitation is made by the subordinate rather than the superior, private employment of the latter by the former may be permissible if the proper public disclosures are made. Individuals considering such arrangements should contact the Ethics Commission's Legal Division for specific advice.

IV. INHERENTLY INCOMPATIBLE ACTIVITIES

A municipal employee is prohibited from accepting other employment involving compensation of substantial value ($50 or more) the responsibilities of which are inherently incompatible with the responsibilities of his or her public office. For example, in a 1984 enforcement case, a state mediator admitted he violated the conflict law by working privately for a union when he was simultaneously involved in mediating a labor dispute with the same union.

V. USE OF CONFIDENTIAL INFORMATION

No current or former officer or employee of a municipal agency may:

accept employment or engage in any business or professional activity that will require disclosure of confidential information the employees have gained by reason of their official position or authority; nor

improperly disclose material or data that are not considered public records, when employees acquired such information in the course of their official duties; nor

use such confidential information to further their personal interests.

Example: A former employee of the town personnel office sets up her own employment placement service and uses confidential information from the town's personnel records to prepare a client list for use in her private business. This violates section 23 because she would be using confidential information acquired in the course of official duties to further her personal interests, and also because she would be using her official position to secure for herself an unwarranted privilege not properly available to similarly situated individuals (i.e., other placement services).

* * *

Commission Fact Sheets are prepared and issued by the Public Education Division of the State Ethics Commission. They are intended to provide guidance to public officials and employees concerning practical applications of the conflict law.

ISSUED: March 1987
REVISED: January 28, 1991
REVISED: December 31, 1992

DISCLOSURE
AS REQUIRED BY G.L.c. 268A, §23(b)(3)

FOR OFFICE USE ONLY
30-_____
Date Received: _____
Reviewed by: _____
Determination Received: _____

1. Name: _____

2. Title or Position: _____

3. Agency: _____

4. Address where employee regularly works: (if applicable) _____

5. Agency Address: _____

6. Daytime Telephone Number: _____

I publicly disclose the following facts pursuant to G.L.c. 268A, §23(b)(3): _____

_____

_____

_____

_____

_____

_____

I make this disclosure pursuant to G.L.c.268A, §23(b)(3) in order to dispel any appearance of potential conflict of interest occasioned by the facts set out above, that I may be improperly or unduly influenced in the performance of my official duties, or that I would be likely to act or fail to act as a result of kinship, rank, position or the undue influence of any party or person with regard to the above circumstances.

§23(b)(3) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know... act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

_____ _____

Signature Date

Appointed officials and employees (state, county and municipal) should file with their appointing authority.
Elected state officials should file with the appropriate House or Senate Clerk or the Ethics Commission
Elected county officials should file with the county clerk.
Elected municipal officials should file with the city or town clerk.

The Commonwealth of Massachusetts
State Ethics Commission

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COMMISSION FACT SHEET NO. 2

LIQUOR LICENSES AND THE CONFLICT LAW

There has been a great deal of confusion concerning the propriety of municipal officials voting on liquor license matters when they, their family or the business they work for owns such a license. This fact sheet provides the basic "rules" local officials must follow to comply with the conflict law.

Section 19 of the conflict of interest law prohibits a municipal official from participating in any matter which affects his own or his immediate family's financial interest. (Immediate family is defined in the law as municipal employees, their spouses, and each of their parents, children, brothers and sisters.) Section 19 also prohibits local officials and employees from voting on matters affecting a business for which they work or serve as a partner, director, officer or trustee.

This means that municipal officials may not vote to issue or renew liquor licenses owned by any of the above -- even if licenses are simply renewed automatically on a yearly basis. It also makes no difference whether the license is up for renewal alone or if the license is one of out of fifty receiving renewals at the same time. The official must always abstain from voting on liquor licenses for himself, his immediate family or a business with which he's affiliated.

The larger issue involves whether municipal officials who hold liquor licenses (or whose family or place of business holds a license) can vote on any liquor license matter in their community. The prohibition in the conflict law extends to voting on matters affecting the financial interest of competitors. Therefore, municipal officials may not vote on any liquor license matter of a competitive establishment in town.

In some of the smaller communities, every liquor license holder may be in competition; in larger cities perhaps the "competitive zone" is much smaller. In an opinion issued in January, 1987, the Commission stated that a restaurant seeking a commercial liquor license was not in competition with a private club holding a restricted liquor license. In this opinion, the Commission allowed a selectman, who was the president of the corporation that operated the private club, to vote on the restaurant's application.

There is no one easy "rule" for local officials to rely upon when deciding who the competitors are for any liquor license holder. In a prior Commission advisory opinion, the Commission indicated that local authorities are often in a better position than the Commission to identify the local factors which would make a liquor license holder a competitor.

We suggest that appointed officials rely on their appointing authorities to make such a determination. In cases where elected officials are responsible for issuing liquor licenses (i.e., the Board of Selectmen) the board member who holds a liquor license should seek guidance from town or city counsel or from the Commission.

Finally, if there is a "stalemate" concerning the issuance or renewal of a liquor license, the Board member who has a financial interest in the license may not participate to break a tie vote. However, if a Board is unable to act because a majority of members are disqualified due to a conflict of interest, the "rule of necessity" may be invoked to allow the members' participation. There is a formal process that must be followed to invoke the rule of necessity. We urge municipal officials to contact us when faced with such a situation.

* * *

Additional questions should be directed to the Legal Division of the State Ethics Commission at 727-0060.

* * *

Commission fact sheets are prepared and issued by the Public Education Division of the State Ethics commission. They are intended to provide guidance to public officials and employees concerning practical applications of the conflict law.

ISSUED: March, 1987
REVISED: January 28, 1991

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COMMISSION FACT SHEET NO. 3

GUIDELINES FOR MUNICIPAL OFFICIALS VOTING ON BUDGETS WHICH INCLUDE SALARIES FOR FAMILY MEMBERS

Section 19 of the conflict of interest law prohibits a municipal official from participating in any particular matter that affects the financial interest of an immediate family member. "Immediate family" is defined in the conflict law as the employee and his or her spouse, as well as each of their parents, children, brothers and sisters.

In situations where a municipal official's family member is employed by the same city or town, the official may not participate in any discussion or vote on any budget item that would affect the family member's salary. The prohibition includes voting on a budget item that will merely maintain the salary of a family member at its present level or approving "automatic" salary step increases in a budget. The prohibition applies even in cases where a number of other employees (or all employees) are given similar increases.

A 1976 Supreme Judicial court decision, **Graham v. McGrail**, provided the basis for the following guidelines for public officials when faced with this conflict:

1. The municipal official must always abstain from voting on budget items that affect an immediate family member's financial interest.

Not only must the official abstain from voting, he or she may not participate in any official discussion of the matter. The court advised that the best course of action is simply to leave the room during the deliberation and vote of the board.

A public official may vote on the whole budget, including salaries, once the following procedure has been followed: the board must identify the budget line item which includes the family member's salary and vote on it separately. The official whose family member's salary is affected by this line item must abstain from the discussion and vote. After all such conflicts are dealt with through this line item procedure, the board may then vote on the budget as a whole package, with all members participating in the final vote to approve the "bottom line."

> Example: A school committee member whose father works as a custodian for the school department must abstain from voting on the line item of the budget which includes his salary. She appropriately leaves the room during any deliberation and vote on this matter. She may vote on any other line item. She may also participate in the final vote to approve the budget as a whole at the end of this process.

2. City councils and boards of aldermen have the power to vote on the "bottom line" school department budget, but not on specific line items. Because of this, if a conflict arises, the city councillor or alderman may not take advantage of the line item procedure described above; however, there is an alternative. The Commission has ruled that city councilors and aldermen with family members working for the school department may vote on the bottom line school department budget, but they may not discuss or make nonbinding recommendations on the budget line items affecting their family members' salaries.

3. Elected town meeting members are exempt from the conflict of interest law. Town meeting members may vote on any line item or consolidated budget -- whether or not their family members' salaries are affected. The same is true for citizens who attend the town meeting in communities which have the "open" town meeting form of government. Town meeting members who hold municipal positions in the community may vote on their municipal agency's budget, including salary line items that may affect family members.

A somewhat difficult situation arises when a municipal official acts in his or her official capacity at town meeting in presenting a budget, recommending a change or defending a budget line item affecting the financial interest of a family member. If this situation comes up, we urge municipal officials to contact us for advice prior to town meeting.

Example: A finance committee member is also a town meeting member. The finance committee member is acting in his official capacity as a municipal employee at a town meeting when he presents the budget and answers questions about the budget. If his son works for the police department, a question arises as to whether he may participate in discussing the salary line item of the police department's budget at town meeting because it affects the financial interest of his son. He needs to get specific advice on this. The finance committee member, because he is also a town meeting member, may vote on the police department's budget including any salary line items which may affect his son's salary.

4. An exemption is available for appointed municipal employees, which will allow them to act on a budget affecting an immediate family member's financial interest. They must receive advance, written permission to participate from the person or board that appointed them to their job (the appointing official). To receive this permission, the employee must first advise his or her appointing official in writing of the conflict. If the appointing official decides to allow the employee to participate, the determination must be made in writing, in advance of any action, that the financial interest of the employee's family member "is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee." Both the disclosure and the appointing authority's determination must be filed with the town clerk to allow for public review.

* * *

Any questions concerning these guidelines should be directed to the Legal Division of the State Ethics Commission.

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COMMISSION FACT SHEET NO. 4

"SPECIAL" MUNICIPAL EMPLOYEES

The conflict of interest law, G.L. c. 268A, covers all municipal officials and employees, whether elected or appointed, paid or unpaid, full-time or part-time. However, two sections of the conflict law apply less restrictively to those part-time or unpaid municipal officials who have been designated as "special municipal employees."

"Special municipal employee" status can be assigned to certain municipal positions by a vote of the board of selectmen, board of aldermen, town council or city council. Several specific municipal positions are automatically designated as "special" under the law. Your position is eligible to be designated as a "special municipal employee" position provided that:

1. you are not paid; or
2. you hold a part-time position which allows you to work at another job during normal working hours; or
3. you were not paid by the city or town for more than 800 working hours (approximately 20 weeks full-time) during the preceding 365 days.

It is the municipal *position* that is designated as having "special" status, not the individual. Therefore, all employees holding the same office or position must have the same classification as "special municipal employees". For instance, one member of a school committee cannot be classified as a "special" unless *all* members are similarly classified.

The designation may be made by a formal vote of the board of selectmen, board of aldermen, town council or city council at any time. Votes should be taken individually for each board or position being designated -- expressly naming the positions being designated. Once a position is designated as having "special" status, it remains a "special municipal employee" position unless and until the classification is rescinded. A list of all the "special municipal employee" positions should be on file at the town or city clerk's office. This list should also be filed with the Ethics Commission.

Under no circumstances may a mayor, city councillor, town councillor, alderman, or selectman in a town with a population of more than 10,000 be designated as a "special". However, in towns of 10,000 or less, selectmen are automatically considered "special" employees. Other municipal positions in towns with a population of less than 10,000 must still be designated as "special municipal employee" positions by the selectmen.

The Legislature may also designate certain positions to have "special municipal employee" status. For example, board members and part-time employees of local housing and redevelopment authorities are defined by law as "special municipal employees" and do not need to have local authorities approve their designation as "specials". (See G.L. c. 121B, §7.)

THE CONFLICT LAW IS LESS RESTRICTIVE FOR "SPECIALS"

Only two sections of the conflict of interest law apply less restrictively to "specials" -- §§ 17 and 20. All other sections of the conflict law that govern regular municipal employees apply to "special municipal employees" in exactly the same way. See the *Summary of the Conflict Law for Municipal Managers* or the *Practical Guide to the Conflict Law for Municipal Employees* for information on your responsibilities under the law (these publications are available from the State Ethics Commission). Remember that even if you serve on an unpaid part-time board or commission, you are still considered a regular municipal employee, unless your position has been expressly designated as having "special municipal employee" status.

Section 17 -- Acting on Behalf of Others

Section 17 generally prohibits municipal employees from representing a private party before municipal boards or departments. It also prohibits municipal employees from acting as agent (or attorney) for a private party in connection with any matter of direct and substantial interest to their city or town. Finally, it prohibits municipal employees from accepting pay or other compensation in connection with any matter of direct and substantial interest to their municipality.

However, if you are a "special municipal employee", you *may*:

1. represent private parties before municipal boards *other than your own*, provided that you have not officially participated in the matter and the matter is not now (and was not within the past year) within your official responsibility;

2. act as agent for private parties in connection with a matter of interest to your city or town, *provided that* you have not participated in the matters as a municipal official, and that the matter is not (and has not been, during the past year) within your official responsibility; and

3. receive pay or other compensation in connection with matters involving your city or town, *provided that* you have not officially participated in the matters and they are not (and have not been, within the past year) within your official responsibility.

Example: You are a Conservation Commissioner. The Commission has been given "special municipal employee" status. You are also an engineer in private practice in town.

You *may* be hired as site engineer and represent a private development company at a Planning Board hearing, as long as the hearing does not in any way involve Conservation Commission matters.

However, if the hearing is about a wetlands dispute, you could *not* represent the developer before the Planning Board because the matter is under your official responsibility as Conservation Commissioner.

Also, if you prepare site plans, blueprints, structural analyses or other professional documents, you may *not* allow the developer to submit those materials to the Conservation Commission (or to any other municipal boards, in connection with matters under the Conservation Commission's responsibility).

Also, you may *not* be *paid* for giving the developer advice about how to get his project approved by the Conservation Commission, or for any other activity related to the Conservation Commission review process.

Note that the prohibition against "acting as agent" covers any type of activity that involves representing someone other than your city or town. Activities which can be considered "acting as agent" include: serving as someone's spokesperson; making phone calls or writing letters; acting as a liaison; affixing professional seals or signing supporting documentation; and participating as an electrician, plumber or other contractor during municipal building inspections. For more information about §17, request *Advisory No. 13: Municipal Employees Acting as Agent* from the State Ethics Commission.

Section 20 -- Restrictions on Having an Interest in Contracts with your City or Town

Section 20 generally prohibits municipal employees from having a direct or indirect financial interest in a contract with their city or town. However, there are many exemptions in this section of the law. For instance, a municipal employee may own less than 1% of the stock of a company that does business with the municipality.

Also, a municipal employee may have a financial interest in a contract with a municipal department which is completely independent of the one where he works, *provided that* the contract has been publicly advertised or competitively bid, and the employee has filed a disclosure of his interest in the contract with the city or town clerk. Note that there are additional requirements for personal services contracts: contact your town counsel or city solicitor or the State Ethics Commission's Legal Division for more information.

However, if you are a "special municipal employee", you have two additional exemptions to §20:

1. As a "special municipal employee", you may have a financial interest in a contract with a department which is completely independent of the one where you work, provided that you file a disclosure of your interest in the contract with the city or town clerk (there is no "public notice" or "competitive bid" requirement for this "special municipal employee" exemption).

2. As a "special municipal employee", you may even have a financial interest in a contract with your *own* department (or with a department which has overlapping jurisdiction with your department), *provided that* you file a disclosure of your interest in the contract with the city or town clerk *and* the board of selectmen, board of aldermen, town council or city council vote to grant you an exemption to §20.

Example: You are a member of the School Committee, which has been given "special municipal employee" status. You also own a hardware store in town.

You *may* sell light bulbs to the town's Department of Public Works, because Public Works is not under the jurisdiction of the School Committee; however, you *must* file a disclosure of your interest in the lightbulb sales with the Town Clerk.

You also may sell light bulbs to the School Department (which is under the School Committee's jurisdiction), but *only if* you file a disclosure of your interest in the lightbulb sales with the Town Clerk *and* the Board of Selectmen vote to exempt your lightbulb sales from the restrictions of §20.

For more information about restrictions on holding an interest in municipal contracts, contact your city solicitor or town counsel or the Legal Division of the State Ethics Commission.

Section 20 -- Restrictions on Holding Multiple Municipal Positions

Because the restrictions of §20 also apply to employment contracts, municipal employees are generally prohibited from holding more than one municipal position. However, there are many exemptions to this general prohibition. If you are a municipal employee -- regular *or* "special" -- you may:

1. hold any number of *unpaid* positions, because you do not have a financial interest in any of the positions (however, if you hold even *one* paid appointed position, you must look for other exemptions);

2. hold any number of *elected* positions, whether paid or unpaid, because you serve in those positions by virtue of your election, rather than because of an appointment or employment contract (however, if you hold even *one* paid appointed position, you must look for other exemptions); and

3. in some instances, you may hold more than one paid appointed position, provided that the jobs are in separate departments (which do not have overlapping responsibilities) and all paid jobs have been publicly advertised. However, your board of selectmen, board of aldermen, town council or city council must vote to exempt you from §20, *and* there are also other requirements you must meet. For more information, request *Advisory No. 7: Multiple Office Holding* from the State Ethics Commission, or contact your town counsel or city solicitor or the State Ethics Commission's Legal Division.

If you serve in a town with a population of less than 3,500, you may hold more than one position with the town if the board of selectmen formally approves the additional appointments.

If you are a "special municipal employee", you may also:

1. hold any number of other "special municipal employee" positions, *provided that* the positions are with totally independent departments *and* you file a disclosure of your financial interest in all the positions with the city or town clerk;

2. hold any number of other "special municipal employee" positions, even if the departments' jurisdictions overlap, *provided that* you file a disclosure of your financial interest in all the positions with the city or town clerk, *and* the board of selectmen, board of aldermen, town council or city council vote to exempt you from §20.

Example: As a Cemetery Commissioner, you are a "special municipal employee".

You may also hold "special municipal employee" positions on the Board of Library Trustees and on the Waterways Commission, because the three positions are completely independent of each other. However, you must file a disclosure of your financial interest (e.g., stipends, *per diem* payments, salary) in the positions with the Town Clerk.

If you wish to hold a "special municipal employee" position with the Department of Public Works (which maintains buildings on the cemetery grounds) or as the town's Tree Warden (who cares for the trees on the cemetery grounds), you must file a disclosure of your financial interest in the positions with the Town Clerk. and the Board of Selectmen must vote to exempt you from §20.

For more information about holding more than one municipal position, request *Advisory No. 7: Multiple Office Holding* from the State Ethics Commission, or contact your town counsel or city solicitor or the State Ethics Commission's Legal Division.

* * *

The definition of "special municipal employee" can be found in Section 1(n) of the conflict of interest law (G.L. c. 268A). Note that town councils are empowered by G.L. c. 39, §1 to exercise all duties and powers of boards of aldermen.

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COMMISSION FACT SHEET NO. 5

RULE OF NECESSITY

If a member of a town or city board has a conflict of interest, that member will be disqualified from acting on that board matter. In some cases, especially when more than one member is disqualified, a board cannot act because it does not have a quorum or some other number of members required to take a valid affirmative vote. (If the number for a quorum is not set by law, a quorum is generally a majority of the board members.) In these instances, the board can use what is called a Rule of Necessity to permit the participation of the disqualified members in order to allow the board to act.

The Rule of Necessity is not a law written and passed by the Legislature. Rather, the Rule of Necessity was developed because judges applied it in their court decisions.

The Rule of Necessity works in the following way:

1. It can only be used if a board is unable to act on a matter because it lacks the number of members required to take a valid official vote, solely because members are disqualified from acting.

Example: A five member board has a meeting and all members are present. Three of the five members have conflicts. Three members are the quorum necessary for a decision. The two members without conflicts do not make a quorum. The board cannot act. The Rule of Necessity will permit all members to participate.

Example: A five member board has a meeting and four members are present (one member is sick at home). Two of the four present members have conflicts. A quorum is three. The one member who is sick at home does not have a conflict. The Rule of Necessity may not be used because there is a quorum of the board which is able to act. Because one member of that quorum is absent does not permit use of the Rule of Necessity.

Example: A five member board has a meeting and all members are present. One member has a conflict and is disqualified. The vote is a two to two tie. The Rule of Necessity may not be used to break the tie. In general, a tie vote defeats the issue being voted on. (Stated differently, a tie vote will maintain the status quo.)

Example: A five member board has a meeting and all members are present. A quorum is three. However, one agenda item requires four votes, rather than the usual simple majority, for an affirmative decision. Two of the board members have conflicts. Although a quorum is available, the required four votes needed for this particular matter cannot be obtained without the participation of one or both of the members who have conflicts. The Rule of Necessity may be invoked and all five of the board members could participate.

2. The Rule of Necessity should be invoked by one or more of the otherwise disqualified members, upon advice from town or city counsel or the State Ethics Commission.

3. If it is proper for the Rule of Necessity to be used, it should be clearly indicated in the minutes of the meeting that the board was unable to obtain a quorum due to disqualification of members and, as a last resort, that all those disqualified may now participate under the authority of the Rule of Necessity. Each disqualified member who wishes to participate under the Rule of Necessity must first disclose publicly the facts that created the conflict.

It should be noted, however, that invoking the Rule of Necessity does not require all previously disqualified members to participate; it merely permits their participation. The Rule of Necessity may only be used as a last resort.

4. Every effort must be made to find another board capable under the law of acting in place of the board that could not obtain a quorum.

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COMMISSION FACT SHEET NO. 6

DON'T VOTE ON MATTERS AFFECTING ABUTTING OR NEARBY PROPERTY

The conflict of interest law prohibits public employees, including elected officials, from participating (by voting, discussing, delegating or otherwise acting) in any matter that affects:

- their own financial interests;
- the financial interests of their immediate family members (i.e., the employee's spouse; and the parents, siblings and children of both the employee and the employee's spouse);
- the financial interests of a private or "after-hours" employer, or anyone with whom the employee is negotiating prospective employment; or
- any organization, either charitable or for-profit, in which the employee is serving as officer, director, partner or trustee. Note that state and county employees who have a conflicting financial interest *must disclose* that interest to their appointing authorities; municipal employees may simply abstain from participating in the particular matter.

These restrictions apply regardless of how large or small the financial interest is. They apply in any instance where the private financial interests are directly and immediately affected, or where it is reasonably foreseeable that the financial interests *would* be affected. Also, the statute prohibits *any* type of official action in such matters, regardless of whether the proposed action would positively *or negatively* affect the private financial interests.

This provision of the law is intended to ensure that public employees are acting in the best interests of the citizens they represent, and are not pursuing their own self-interest or other private interests.

Under the law, property owners are *presumed* to have a financial interest in matters affecting abutting and nearby property. Thus, unless they can clearly demonstrate that there is *not* a financial interest, public employees may not take any action in their official capacity on matters affecting property that is near to or directly abuts:

- their own property;
- property owned by any immediate family members;
- property owned by a private employer, or prospective employer; or
- property owned by any organization for which the employee is an officer, director, partner or trustee.

The Commission uses the following four-part legal test to determine whether, in a particular situation, a person or organization would have a financial interest in an abutting or nearby property. A financial interest is *presumed* whenever:

- their property directly abuts (i.e., it shares any part of a property line);
- they are a "party in interest" under G.L. c. 40A (i.e., their property is directly opposite a street, public way or private way, or they are an abutter to an abutter within 300 feet of the property line);

- they are a "person aggrieved" for the purposes of G.L. c. 131, the Wetlands Protection Act (see 310 CMR 10.04); or
- the matter would otherwise alter their property value, rights, or utilization. For example, property owners are presumed to have a financial interest in zoning changes, variances, nearby subdivision or development approvals, and roadway, sewerage or safety improvements.

Three statutory exemptions can, in certain instances, allow public employees to take official actions which would otherwise be prohibited:

- Public employees may act on matters of general legislation, and certain home-rule petitions. For example, public employees may draft, promote or oppose general legislation, or legislation related to a municipal government's organization, powers, duties, finances or property. Note that matters involving *other* types of "special legislation", regulations or administrative policies are *not* eligible for this exemption. For more information about this exemption, or for a determination as to whether a bill is "general legislation" or "special legislation", contact your city solicitor or town counsel, your agency legal counsel or the Legal Division of the State Ethics Commission.

- *Before* taking an official action regarding an abutting property, an *appointed* employee must advise his appointing authority of the nature of the private financial interest in the matter, and receive a written determination from the appointing authority that the interest involved "is not so substantial as to be deemed likely to affect the integrity of the services" which the public expects from the employee. State and county employees must file copies of these determinations with the State Ethics Commission. This exemption is *not* available to elected officials.

- A *municipal* employee may act on municipal ordinances, bylaws and other matters of "general policy", provided that the issue affecting the private financial interests also affects a "substantial segment" of the municipality's population. The Ethics Commission has previously ruled that 10% of a municipality's population is a "substantial segment" for the purposes of the conflict law; therefore, municipal employees may clearly act on matters affecting their own financial interests, or other private interests, if the matter also affects at least 10% of their municipality's residents (as determined by the most recent census). Note, however, that there is no legal precedent precisely defining the percentage that would constitute a "substantial segment" of the population. For more information about this exemption, or for a ruling as to whether a population segment smaller than 10% is "substantial", please contact the Legal Division of the State Ethics Commission at (617) 727-0060.

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COMMISSION FACT SHEET NO. 10

BUSINESS AND ENTERTAINMENT EXPENSES FOR PUBLIC OFFICIALS

In August of 1988, the Commission issued a Public Enforcement Letter to one bank and five municipal treasurers, spelling out strict limitations on meals and entertainment expenses offered to public officials by private persons and businesses who have official dealings with the public official. The Commission ruled:

- No meal or entertainment expense of "substantial value" ($50 or more) incurred by a public official may be paid for by a private party, whether or not the expense involves a so-called "business lunch";

- Even where the cost of a single meal or other entertainment is less than $50, a private business may not pay for the public official's tab on a regular basis;

- Likewise, even though the cost of a single meal may be less than $50, the private party may not issue a "standing offer" to pick up the tab on behalf of public officials;

- If the cost of a meal or entertainment is less than $50 for a public official, but more than $50 when that official's guest is included, the entire bill will be attributed to the official and constitute a violation of the conflict law.

Section 3(a) of G.L. c. 268A prohibits the giving of anything of substantial value to public employees for or because of their official duties; Section 3(b) of the law prohibits public employees from accepting such gratuities.

Gratuities do not need to be given for or because of some specific, identifiable act performed or to be performed by the public employee for a Section 3 violation to occur; nor is it necessary to prove that any wrongdoing resulted from private individuals or businesses covering such expenses. All that is required is a connection between the motivation for the gift and the public employee's official duties. If the giver is in a position to benefit from the public employees's actions in his or her official capacity, the gift is prohibited.

Section 3 also prohibits a vendor or other individual from giving anything of substantial value to a public employee even to thank the employee for a job well done, to permitting public officials to get multiple remuneration for doing what they are already expected to do -- a good job.

The Commission has determined that gifts of substantial value to public employees are prohibited even in situations where friendship or a legitimate public purpose are motivating factors in offering the gift. Unless friendship or a legitimate public purpose is the motivating factor, the offering or acceptance of the gift violates the conflict law.

WHAT CONSTITUTES SUBSTANTIAL VALUE

The courts and the Commission have determined that meals and beverages costing $50 or more are considered items of substantial value, and public employees are therefore prohibited from allowing private vendors to cover their expenses in such instances, even if the meal is a so-called "business lunch."

In addition, if an individual, business or company pays for a public official's meals on a regular basis, or pays for an official's guest in a situation where the official would otherwise pay for the guest's meal, the combined costs of all such expenses will be considered in determining substantial value.

The Commission has also ruled that gifts of tickets to theater and sporting events, and/or the payment of fees for recreational activities such as golf, are all items of substantial value if the individual or combined costs of such events amounts to $50 or more.

Finally, the Commission has decided that waiving or reducing the admission price to a non-political fundraising event in an amount of $50 or more also constitutes a gratuity of substantial value. Questions regarding attendance at political fundraising events should be reviewed by the Office of Campaign and Political Finance.

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COMMISSION FACT SHEET NO. 12

GUIDELINES FOR PUBLIC EMPLOYEES REGARDING BUSINESS TRAVEL AND RELATED EXPENSES

This fact sheet explains how the Conflict of Interest Law, Massachusetts G.L. c. 268A, applies to private payment of public employees' business travel and related expenses.

I. BACKGROUND

Many public employees are asked each year to travel on official business. Payment by vendors (or other private parties) of public employees' travel expenses, as well as offers of special travel discounts or other travel benefits for public officials and employees, raise questions under two sections of the conflict law, §§ 3 and 23. The situation is particularly problematic if a public employee is in a position to take official action on matters affecting the interests of the vendor or other private party.

First, §3 of G.L. c. 268A prohibits state, county or municipal employees from soliciting or accepting anything of substantial value for or because of any official act they have performed or will perform. Section 3 also prohibits the giving or offering of anything of substantial value to public employees for or because of their official position, even to express gratitude or to foster goodwill. The Ethics Commission has determined that anything worth $50 or more is always of substantial value for purposes of the conflict law.

Furthermore, acceptance of items of *less* than substantial value may violate §3 if a public employee establishes a pattern of accepting such items from a private party or entity. If the aggregate value of the items accepted from one source equals or exceeds $50, the Commission may use the aggregate value to establish the "substantial value" threshold. "Official act" is defined by the statute to include "any decision or action in a particular matter," or any act within an employee's official responsibility. G.L. c. 268A, §1(h).

Second, the standards of conduct set out in §23 of G.L. c. 268A prohibit public employees from using their official positions to secure unwarranted privileges of substantial value for themselves or anyone else, or from engaging in conduct that would cause a reasonable person to believe that they could be improperly influenced in the performance of their official duties by any person or business entity.

II. VENDOR PAYMENT OF BUSINESS TRAVEL EXPENSES

As noted above, public employees may not accept anything of substantial value for or because of acts within their official responsibility. This prohibition includes direct acceptance from a vendor of travel expenses incurred while working for a government agency or other public entity. Under the conflict law, public employees may not allow vendors to pay directly for their transportation, accommodation or meal expenses during such trips. Situations where this section of the conflict law comes into play include, but are not limited to, travel by selection committees to evaluate products or services being considered for purchase by the state, a county or a municipality[1/]; and travel by public employees in connection with existing public contracts. Public employees must be aware of potential conflict problems whenever they travel in connection with the negotiation or performance of public contracts.

Options

Only under certain limited circumstances is it permissible for vendors or potential vendors to subsidize travel by public employees. First, cities and towns may adopt an ordinance or bylaw regulating vendor payments for travel expenses. Such ordinances could ensure that the travel expenses are legitimate and directly related to the public purposes served by the travel.

Alternatively, G.L. c. 44, §53A may provide a means by which a private party may pay for the travel expenses of local officials or employees. This section of the municipal finance law appears to allow a municipality to accept grants from private parties and, in turn, the city/town may expend such funds for the specific purpose the funds were provided for, including travel, so long as the mayor or board of selectmen approves the expenditure. This procedure allows for scrutiny by the city treasurer or auditor as to the reasonableness of the expenses incurred, and thus substantially reduces the potential for abuses.

For state agencies, arrangements may be structured such that vendors would make a monetary donation to the agency specifically earmarked for travel expenses, and the traveling employees' expenses would be reimbursed in the normal manner by their agency.

Alternatively, most state employees may rely on the regulations (801 CMR 7.00) established under *Administrative Bulletin No. 92-15* to allow them to accept direct vendor payments for travel and related expenses under appropriate circumstances. The regulations and related information are available from the Executive Office of Administration and Finance (617-727-2040).

[1/]Members of selection committees are considered public employees for purposes of G.L. c. 268A. A selection committee's evaluation of prospective vendors clearly constitutes the performance of an act under the employees' official responsibility; therefore, to accept directly subsidized travel, accommodations and meals from vendors while evaluating their products for the state, county or municipality is a violation of the conflict law if the expenses total $50 or more.

By properly following these safeguards, public employees would not directly receive anything of substantial value from private parties, and would therefore not be held accountable under the conflict law, or if they did receive expenses directly, the public employees would nonetheless be protected from violating the conflict law by the appropriate ordinance. bylaw, or regulation.

Public officials contemplating such arrangements should contact the Ethics Commission's Legal Division for further advice.

III. TRAVEL DISCOUNTS FOR OFFICIAL AGENCY USE

A. General Discounts

Questions have also arisen under the conflict law regarding vendors offering agency-wide discounts on transportation and travel-related accommodations as part of their contract agreements with government agencies.

While the cumulative value of an agency-wide travel or accommodation discount would almost certainly exceed the $50 "substantial value" limit, §3 would not prohibit such discounts because the Commission has held that a gift from a private party for use by a government agency does not violate §3. For example, the Commission has determined that a state agency that operates a transportation facility would not violate either §3 or §23 by enrolling the agency in a corporate car rental discount program where the car rental company is a tenant of the agency and would be the only car company used by the agency. In another case, the Commission determined that a non-profit mental health clinic that has a partnership arrangement with the state may, subject to §3, offer state employees who work at the clinic productivity incentive credits for increased work during a normal weekday for use towards acquiring books and other items limited to their official state use, but not for conference fees or travel expenses for individual employees.

Similarly, although §23 of the conflict law prohibits public employees from using or attempting to use their positions to secure unwarranted privileges of substantial value for themselves or others, a gift from a private party to a government agency does not violate §23. A public employee could, for example, accept on behalf of his or her agency an award of a trip for educational purposes paid for by a private company, as long as the employee's agency did not directly or indirectly regulate the activities of the company, and the award was given to the *agency* and not as a personal gift offered to any particular employee.

If the discount is not aimed at an individual, there is no opportunity and no incentive for an individual employee to use his or her position to secure the discount for individual benefit.

B. Frequent Flyer Points Offered As Part of a Corporate Discount

Frequent flyer points differ from other agency-wide travel discounts offered to government agencies by private parties. This is because, in general, they can only be awarded to *individuals*

rather than to an agency as a whole. Therefore, frequent flyer points offered as an incentive to participate in an agency-wide corporate discount program may *not* be accepted by public employees if they are for the employees' personal use.

The prohibition against individuals accepting frequent flyer points as part of a state, county or municipal corporate discount is not intended to discourage public employees from continuing efforts to budget travel expenses efficiently. For example, depending upon the express terms of some frequent flyer program agreements and Federal Aviation Administration (FAA) guidelines, the establishment of a pool of frequent flyer points and related bonuses accrued on government business travel for use on other government travel would be permitted under G.L. c. 268A. If you are considering such an arrangement for your agency, please call the Commission's Legal Division before taking any action.

IV. SPEAKING ENGAGEMENTS

Public employees may participate in legitimate speaking engagements in connection with their public jobs and may accept expense payments necessary to cover travel costs for such engagements without violating either §3 or §23, *provided* that certain guidelines are followed. The guidelines for Legislators are different from those for other public employees. Legislators should consult *Commission Advisory No. 2: Honoraria*.

To be considered "legitimate" for purposes of the conflict law, speaking engagements must be:

a) formally scheduled on the agenda of a convention or conference;
b) scheduled in advance of the public employee's arrival at the event;
c) before an organization that would normally have outside speakers address them at such an event;
d) not perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints.

Acceptance of an honorarium for non-Legislator public employees who are speaking as part of their official duties is absolutely prohibited.

The Commission has ruled that it is permissible under the Conflict of Interest Law for state employees to accept direct reimbursement from a sponsor for expenses actually incurred in delivering a speech given as part of the employee's official duties. It is very important to note that the allowance is for *legitimate speaking engagements only*, and not for any other kind of official travel.

If a speaking engagement is *not* in connection with a public employee's official position or duties, travel expenses and honoraria may be accepted by the individual; but employees must avoid

any use of public resources in connection with the speech. Such resources include, for example, computer, copier and telephone access, secretarial help, office supplies and sick time. In addition, the speaking engagement and any related preparation must be done entirely on the employee's own time -- including travel to and from the speaking location. Public employees should also be aware that if the speech is being sponsored or paid for by an individual or business having dealings with the public office or agency for whom the employee works, public written notice to one's appointing official may be necessary to avoid an appearance of conflict pursuant to Section 23 of G.L. c. 268A.

In all cases, however, expenses must be limited to those necessary to making the speech. Thus, the public employee should receive only those items of transportation, lodging and meals that are directly related to a legitimate speaking engagement and no more.

* * * * *

This Fact Sheet is intended to elaborate on the circumstances in which private reimbursement for business-related travel is permitted by the conflict of interest law. Commission Fact Sheets are prepared and issued by the Public Education Division of the State Ethics Commission. They are general in nature and are not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency legal counsel or the Legal Division of the State Ethics Commission at (617) 727-0060.

ISSUED: March 1990
REVISED: May 1990
REVISED: January 1993
REVISED: November 1993

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COMMISSION ADVISORY NO. 3

THE APPOINTMENT OF MUNICIPAL OFFICIALS TO POSITIONS SUPERVISED BY THEIR OWN BOARDS

Members of municipal boards[1/] are generally prohibited from being appointed by their own board to any position under the direct supervision of that board. In addition, board members must wait 30 days after resigning their board membership before they are eligible to be appointed to such a position. These restrictions are set out in §21A of G.L.c. 268A, the conflict of interest law, and may be waived only by a vote of the annual town meeting.

Thus, unless there has been prior town meeting approval, members of a local board may not be appointed by that board to any position -- whether compensated or uncompensated -- under the supervision of that board until 30 days after they leave their board position.

These restrictions are designed to prevent people serving in municipal government from having the "inside track" on other positions and employment opportunities. As the Supreme Judicial Court has pointed out in dealing with the principle of incompatibility of offices, the "personal and selfish interest [of a board member under consideration for an appointed position] would prevent him from having as a member of the board...an eye single to the interest of the public." *Attorney General v. Henry*, 262 Mass. 127, 132 (1928).

Town Meeting Approval Exemption

Approval of an exemption to §21A must be made at an "annual" town meeting, not at a "special" town meeting. The vote should specifically name the individual and positions to be exempted. The vote should be repeated each time the individual is reappointed to the subordinate position. See *EC-COI-93-19* (assistant to the board of selectmen, who is subject to annual reappointment, must, if she is elected to be a member of the board, seek town meeting approval each year she holds both positions).

Note that, for city officials, §21A's prohibition is absolute: there is no exemption or approval mechanism available for city governments.

Situations Which do *Not* Trigger the Restrictions of §21A

Positions on board subcommittees and positions held *ex officio* by virtue of the original board membership are considered to be *part of* the original board membership, and therefore do not trigger the restrictions of §21A. Generally, a board member may serve on a board subcommittee, so long as his membership on the subcommittee would terminate if he were to resign from the primary board. Similarly, a board member may serve *ex officio* on another municipal committee that reports to his board, as long as the committee membership would automatically terminate should he resign from the original board.

Also, §21A is not triggered by appointments to positions that are not under the *direct* supervision of the board. For instance, the 30-day waiting period would not apply to a former school committee member who is under consideration for a position in which he would report to the school superintendent. Note, however, that actions which are allowable under §21A are still subject to the restrictions of other sections of the conflict law.

Finally, the restrictions of §21A do not apply to a person who is first employed by a board or commission and is later elected to that same board. However, any subsequent appointment or reappointment of the employee/board member to the subordinate position *would* trigger this section. See *EC-COI-93-19*.

Other Restrictions of the Conflict of Interest Law

Even *if* an exemption to §21A is granted by vote of an annual town meeting, the board member must still comply with all other restrictions of the conflict law, including:

- **Section 19** generally prohibits municipal employees, including elected officials, from participating in any particular matter that affects their own financial interests. Thus, a board member who has received a §21A exemption must generally abstain from participating in the process by which he is appointed to an additional, compensated position. See *EC-COI-93-19*. This prohibition on participation includes not just the final, formal vote on the appointment, but also: being involved in the drafting or determination of the job description; participating in the interviews of other applicants for the position; discussing the candidates' qualifications or making recommendations; lobbying board colleagues; approving, disapproving or delegating salary decisions and similar matters; and any other type of official action which would reasonably foreseeably affect the municipal employee's financial interests. See *EC-COI-87-25*. Board members who are under consideration for an appointment by their board should generally leave the room during any action on the matter. See *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

  The restrictions of §19 would *not* apply in cases where the subordinate position is uncompensated, because the board member would *not* have a financial interest in the appointment. However, even if there is no financial interest in the position, the board member/applicant should file a public disclosure under the terms of §23(b)(3) (frequently referred to as the "appearances" section) before participating in his official capacity in any matter related to his own appointment.

- **Section 20** generally prohibits municipal officials from holding more than one position with the same municipality. Thus, a board member who wishes to retain his board position after being appointed to the additional position may need to obtain an exemption to §20. See *Commission Advisory No. 7: Multiple Office Holding at the Local Level* for more information about possible exemptions. Note that §19 generally prohibits the board member/applicant from participating (in his official capacity) in any decision whether or not to grant himself "special municipal employee" status or an exemption to §20. See *EC-COI-93-19*.

Waiting Periods

Unless they obtain a Town Meeting exemption to §21A, board members must wait 30 days after resigning their board positions before they are eligible to be appointed by that board to a position under the direct supervision of that board.

An additional restriction applies to certain elected officials who held a municipal position before being elected to office. Three of the exemptions to §20 -- the "selectmen's exemption", the "town councillors' exemption" and the "housing authority employee" exemption -- impose an additional six-month waiting period, after the officials resign their elected position, before they are eligible for appointment to any additional municipal position. This six-month waiting period applies *only* to elected officials who rely on one of these three §20 exemptions to continue to hold their original municipal employee position. Officials who do not require an exemption to §20, or who rely on *other* §20 exemptions, are *not* bound by this waiting period. See *EC-COI-82-106; EC-COI-87-36; EC-COI-93-4*.

Legal Obligations of Other Municipal Officials

Board members who appoint a colleague to a position for which the colleague is not eligible under §21A may *themselves* violate certain sections of the conflict of interest law, for instance:

- **Section 23(b)(2)** prohibits municipal employees, including elected officials, from using their official position to secure for themselves "or others unwarranted privileges or exemptions which are of substantial value[2/]... ." Appointing someone to a position for which he is not eligible would be an unwarranted privilege or exemption, and would therefore likely violate §23(b)(2).

- **Section 23(b)(3)** generally prohibits municipal employees, including elected officials, from acting in a manner which would cause a reasonable person to believe that any person can unduly enjoy their favor in the performance of their official duties. Given the clear intent of §21A, appointing a colleague to a position for which he is not eligible cannot help but give the impression that the person being appointed is unduly enjoying the favor of his fellow board members, and would therefore likely violate §23(b)(3). Note that §23(b)(3) includes a public disclosure exemption mechanism: a public employee may take actions which would otherwise violate §23(b)(3) if he first makes an appropriate public disclosure of all the relevant facts. See *Commission Fact Sheet No. 1: Avoiding "Appearances" of Conflicts of Interests* for more information about this exemption.

Other Provisions of the General Laws

G.L. c. 41, §4A may also apply to situations where a town or district board appoints one of its members to an office of that town or district. You should contact your local town counsel regarding the applicability of this statute.

AUTHORIZED: March 27, 1984
REVISED: May 16, 1996

[1/] For clarity's sake, this advisory uses the terms "board" and "boards" as generic references. Note that G.L. c. 268A, §21A applies to *all* multi-member municipal agencies, however named or constituted. See *EC-COI-92-30*. Thus, its restrictions also apply to members of city councils, municipal commissions, committees and all other types of multi-member municipal agencies.

[2/] Anything worth $50 or more is "of substantial value". See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

Massachusetts General Laws Chapter 268A, Section 21A
Members of municipal commission or board; restrictions on appointments to certain positions.

Section 21A. Except as hereinafter provided, no member of a municipal commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.

The provisions of this section shall not apply to a member of a town commission or board, if such appointment or election has first been approved at an annual town meeting of the town.

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COMMISSION ADVISORY NO. 8

FREE PASSES

Through requests for advisory opinions, complaints received from the public, and its own independent investigations, the Commission has become aware of a widespread and longstanding practice in the entertainment industry of providing free passes to public officials for entertainment events. The purpose of this advisory is to alert both the industry and public officials that this practice often involves a violation of the conflict of interest law, G.L. c. 268A, in many instances by both the giver and the receiver.

I. BACKGROUND

The Commission has information that several theater chains and racetracks are or until recently have been providing free season passes to public officials at the state, county and local levels. The Commission also has information that certain persons and corporations, including the owners of certain professional sports teams, have been providing free admission to such officials.

II. THE "GIVER"

Section 3(a) of G.L. c. 268A[1/] prohibits anyone from giving anything of substantial value to a present or former state, county or municipal employee for or because of any official act performed or to be performed by such employee.

As the Commission stated **In the Matter of George Michael**, 1981 EC 59, 68:

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do -- a good job.

1. A season pass to a theater, racetrack or other entertainment facility which charges a fee for admission is an "item of substantial value" within the meaning of §3. Although the precise market value of such a pass may be speculative (as it cannot be known in advance how

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[1/]Section 3(a) and (d) provide in pertinent part:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value to any present or former state, county or municipal employee...for or because of any official act performed or to be performed...shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

often the pass will be used), so long as there is more than a nominal fee charged for admission, the unlimited ability to use the pass for as many entrances as desired makes the pass an item of substantial value. (This is particularly true where the cost of theater admission is rising, and, indeed, where some of these passes provide for admission for the holder and a guest.)

Rather than season passes, some establishments and organizations provide public officials with single admission tickets. In determining whether such tickets are an "item of substantial value:

a. under §3, generally the face value multiplied by the number of tickets involved will be the value. If that value exceeds $50, it will be considered substantial value.[2/] In extraordinary circumstances where the real value of a ticket far exceeds its printed face value (world series tickets, for example), such tickets may be considered to be items of substantial value.

b. A §3 issue may also arise if there is a standing offer to be accepted at anytime for tickets. It is likely that any such offer would be deemed to involve substantial value. Similarly, if there is a matter of periodically giving a public official tickets, the course of conduct will be evaluated as to its value.

   This would be the case, for example, if someone gave a public official a ticket to an entertainment event each and every weekend.

2. Another factor in determining whether §3 has been violated is whether the item of value has been given for any "official act performed or to be performed." Clearly, where a matter of interest to the giver is pending before the public official who receives it, this element is met. Thus, if a theater chain gave a season pass or individual tickets of substantial value to a local tax assessor where the chain has a tax abatement application pending before that assessor, §3(a) would be violated.

   Section 3(a), however, is not limited to instances where a matter is actually pending before the official. In referring to an "official act performed or to be performed," §3(a) also includes prior and future acts by the official. **See, In the Matter of George A. Michael**, 1981 EC 59, 68.[3/] In fact, even in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use their authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver.[4/] In such a case, the gratuity is given for as yet unidentified "acts to be performed."

[2/]**See, Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[3/]There need be no showing of an explicit understanding that the gratuity is being given in exchange for any specific act performed or to be performed. **Michael**, supra at 68. Indeed, any such quid pro quo understanding would raise extremely serious concerns under §2 of c. 268A (the "bribe" section). Thus "[a]ll that is required to bring section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited." Id.

[4/]As the federal courts construing the federal counterpart of §3(18 U.S.C. §201(f) and (g) have observed,

By way of example, if a developer is doing business in a city or town, he or she may not give tickets of substantial value to any town official in a position to use their authority in a manner which could affect the developer. Thus, even if the developer had no recent subdivision plan pending or anticipated, it could not give such tickets to a planning board member without raising §3 concerns. Indeed, he or she could not give such tickets to a mayor, a selectman or councilman, a board of health, zoning board of appeals or conservation commission member, or any other such public official, all of whom could presumably exercise authority to affect the giver's interests.

All this is not to say that <u>any</u> gift of tickets or passes to a public official would constitute a violation of 268A. Where no services or discretionary activity have been or are being performed, nor is the public official in a position to use their authority in a manner which could affect the giver, nothing illegal has occurred. In many, if not most instances, however, an expectation (at the very least) of favorable consequences is anticipated by the giver and under such circumstances §3(a) would be violated.

3. A third factor in determining if §3 has been violated is whether the item of substantial value is given "for or because of" the official acts described above. As just discussed, absent a legitimate prior social or business relationship between the giver and the public official recipient, an inference to be drawn where tickets are given to officials with authority to affect the giver's interests is that the gratuity is intended to do precisely what the statute prohibits: obtain the public official's goodwill. Indeed, some past lists maintained by givers of these free passes are not by name, but rather by public position only.

III. <u>THE "RECIPIENT"</u>

Section 3(b)[5/] is the "flip side" of §3(a). It prohibits a public official from accepting an item of substantial value for or because of an official act performed or to be performed. The analysis here is similar to that described above. Any state, county or local official who receives a season pass, a standing offer for a ticket, or tickets of substantial value from a person whose interests they could affect as a public official, face an inference that they knew that the reason they were receiving the gratuity was for or

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> [it is] unnecessary to prove that the gratuities received by a public official were in any way generated by some specific identifiable act performed or to be performed by the official.... It was sufficient that the gratuities to which he was not legally entitled were given to him in the course of his everyday duties for or because of official acts performed or to be performed by him and where he was in a position to use his authority in a manner which could affect the gift giver.

United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D.Pa. 1978), <u>aff'd on other grounds</u>, 447 U.S. 10(1980). It is the danger of preferential treatment rather than the particular preference against which the gratuity sections guard. **United States v. Irwin**, 354 F. 2d 192, 196 (2d Cir. 1965).

[5/]Section 3(b) and (d) provide in pertinent part:

> Whoever, being a present or former state, county or municipal employee...otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him....shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years or both.

because of their official position and an official act they had performed, would, or could perform. Therefore, such officials may violate §3(b) whenever they ask for or accept such a gratuity.

In addition, as to public officials, the conflict of interest law contains what is commonly referred to as a "code of conduct," §23. In pertinent part, §23 prohibits[6/] a public official from using their position to secure an unwarranted privilege or by their conduct creating the impression that any person can improperly influence or unduly enjoy their favor in the performance of their official duties. As the Commission observed in EC-COI-83-4 (dealing with the practice of Worcester Centrum officials providing themselves with the privilege of reserving as many as 15-20 tickets for even the most coveted performances), "those who serve the people are treated better than the people themselves."

Public employees are already compensated for the performance of their duties. To request or accept any item of more than nominal value -- and in most instances these tickets are clearly of more than nominal value -- from private entities which have been, are, or may be subject to the public official's responsibilities and duties, is to use one's public position to secure an unwarranted privilege and, in addition, necessarily creates the impression that the private entity may be improperly influencing or unduly enjoying the favor of the public official in the performance of their official duties. Such a practice undermines the public's confidence in the credibility and impartiality of the governmental process.

CONCLUSION

The practice of private entities giving and public officials accepting "free passes" strikes at the heart of what the conflict of interest law was intended to prohibit. Both the givers and the public official recipients should be on notice that such acts can come within the Commission's jurisdiction and present the possibility of Commission proceedings under §3 and/or §23. The civil fine that the Commission may impose for each such violation is $2,000. In appropriate cases the Commission may also seek to recover any economic advantage any person obtained in violating §3. Section 3 also carries the possibility of criminal penalties (see footnotes on pages 1 and 4, above).

DATE AUTHORIZED: May 14, 1985

Note: Since this Advisory was written, some provisions of the conflict law have changed. Readers should consult the current version of the law or call the Commission's Legal Division for advice concerning the most recent application of the law in this area.

[6/]Section 23(¶2)(2) and (3) provide in pertinent part that:

No current officer or employee of a state, county or municipal agency shall:

...(2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;

(3) by his conduct give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any part or person.

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COMMISSION ADVISORY NO. 11

NEPOTISM

INTRODUCTION

The term "nepotism" originates from the Latin word for nephew. It originally referred to favoritism to a nephew in granting official positions. Nepotism is now commonly understood to include favoritism of any sort afforded any relative.

The term nepotism does not appear in the conflict of interest law, and for years it was unclear whether the conflict law prohibited nepotism. The Special Commission which initially drafted the law in 1962 indicated that the criminal sections of the law were not intended to apply to nepotism. In August 1983, however, the Supreme Judicial Court concluded in **Sciuto v. City of Lawrence,** 389 Mass. 939 (1983), that the language of the statute clearly prohibited public officials from acting on matters in which an immediate family member had a financial interest. The **Sciuto** case involved a claim by two city police captains of the Lawrence Police Department that the appointment of Patrick Schiavone to police chief was invalid because two prior promotions approved by his brother, the director of public safety, had violated the conflict of interest law. The Court agreed that these promotions violated G.L. c. 268A, §19 and returned the case to the lower court to decide whether any further action should be taken regarding the promotions. The lower court ordered the promotions rescinded pursuant to §21 of c. 268A, and the brother was demoted three levels, losing his position as chief. Following the **Sciuto** decision, the State Ethics Commission began to enforce the conflict law in complaints alleging nepotism.

The purposes of this advisory are to outline the prohibitions against nepotism contained in the conflict of interest law and to explain the Commission's enforcement policy regarding nepotism violations.

I. NEPOTISM IS PROHIBITED

The conflict law prohibits elected and appointed public officials at the state, county, and municipal level from participating[1/] in particular matters[2/] in which their

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[1/]G.L. c. 268A, §1(j) defines participate as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."

[2/]G.L. c. 268A, §1(k) defines particular matter as "any judicial or other proceeding, application. submission, request for a ruling or other determination,

immediate family members have a financial interest. See, G.L. c. 268A, §§6, 13 and 19 dealing with state, county, and local officials, respectively. Immediate family is defined in the statute as "the employee and his spouse, and their parents, children, brothers and sisters." Thus, for example, an official's brother-in-law would be considered "immediate family" if he were the brother of the official's spouse but not if he were married to the official's sister.

In addition to these sections of the law, nepotism raises concerns under G.L. c. 268A, §23, which sets forth standards of conduct regulating all public employees. Essentially, Section 23 prohibits public officials from using their position to secure an unwarranted privilege of substantial value for themselves or others, or from acting in a manner which gives a basis for the impression either that they are improperly influenced by another person, or that someone is unduly enjoying their favor because of kinship. Therefore, if a public official wishes to participate in a matter which affects the financial interest of a relative, even if that relative is not a member of his or her immediate family, (e.g. a cousin or a niece) they may not give preference to the relative because of the relationship, and they must be careful to avoid the appearance of favoritism based on kinship. This is done by publicly disclosing the relationship and following ordinary and accepted procedures without deviation.

The purpose of these provisions is to prevent potential conflicts or the appearance of impropriety that can arise whenever a public official's personal loyalty to a family member competes with the public interest that objective decisions be made regarding public employment.

II. SPECIFIC ACTS THAT ARE PROHIBITED

1. A public official may not hire an immediate family member.[3/] As stated above, the conflict law prohibits a public employee from participating in any particular matter in which a family member has a financial interest. The decision to hire is a particular matter in which an official is "personally and substantially" participating, and the family member has an obvious financial interest in the hiring decision.

   Personal and substantial participation involves any significant involvement in the hiring process. For example, interviewing or creating a test for applicants, one of whom is a family member, would violate the law.

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contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property."

[3/]See, e.g., **In the Matter of Rita Walsh-Tomasini**, 1984 SEC 207 (school committee woman violated §19 by hiring her son as her staff assistant; resolved with a $1,000 fine and son resigning). **In the Matter of George Ripley**, 1986 SEC 307 (state Commissioner of Labor and Industries violated §6 by hiring two daughters; resolved by paying $2,000 fine and both daughters resigning).

An official need not be the sole decision-maker to be prohibited from participating in the hiring decision. For example, an official cannot, as one member on a board, vote to hire their family member, regardless of the size of the board. Nor would it matter that there was little, if any, controversy among the board members regarding the decision. A person can no more participate in making a vote of a 15-member board unanimous by casting the 15th vote than one can cast the deciding vote in an eight-to-seven vote.

It also makes no difference whether an official has unilateral authority over personnel decisions or whether he or she is one link in a bureaucratic chain of approvals. A typical example arises where a sub-committee conducts a search to fill a municipal position. The sub-committee's preferred list of candidates is then narrowed down by the full search committee and the candidate is ultimately chosen by a city council. A public official with a family member in the pool of candidates cannot participate in the sub-committee's search, the full committee's approval of a list of candidates, or the city council's final decision.[4/]

2. In addition to hirings, any significant involvement in the reappointment, promotion, reclassification, demotion, or firing of an immediate family member is prohibited. A public official may not participate in a job performance evaluation of an immediate family member because such evaluations play a critical role in job retention, promotion, and other job-related benefits of financial interest to the employee.

The Commission also views day-to-day active supervision as constituting personal and substantial participation.[5/] The process by which employees are retained or fired, promoted or demoted, or granted or refused step increases is not merely a function of a formal personnel evaluation. Realistically, those decisions are based on the supervisor's cumulative impressions derived from his or her day-to-day supervision of the employee. Therefore, while there may be exceptions, day-to-day supervision of a family member is barred because it is an integral part of the evaluation process.

[4/]**See,** generally **Graham v. McGrail,** 370 Mass. 133 (1976). As the Court advised, participation involves more than just voting, but includes any significant involvement in the discussion or other matters leading up to the vote. The Court suggested that generally the best course would be to leave the room when a matter involving a family member's financial interest arises.

[5/]Active supervision is distinguished from those situations where the public official has official responsibility for his or her family member as a public employee, but does not directly participate in dealing with the family member. A typical example would be where the head of a large agency oversees several divisions but delegates the supervision of each to a division chief, and the division chief supervises the family member.

3. Determining a family member's salary is barred. The prohibition includes approving or authorizing discretionary salary increases such as annual step increases, even though they may be thought of as "automatic".[6/]

4. Finally, a subordinate may not advise or recommend to their employer a personnel decision in which the subordinate's immediate family member has a financial interest.[7/]

III. DELEGATION

A public official is prohibited not only from participating in personnel decisions affecting their family members, but also from delegating the authority to a subordinate. Because the official is in a position to choose and influence the person most likely to favor their family member, the choice of who will make the decision is an important part of the overall hiring decision. [8/]

IV. DISCLOSURE AND AUTHORIZATION

Since a public official cannot participate in personnel decisions affecting a relative, what action, if any, should he or she take when faced with a potential nepotism situation? The answer depends on the position the official holds, because the conflict of interest law treats state and county officials differently depending on whether they are elected or appointed. The law also treats local appointed officials differently from state and county appointed officials.

[6/]By law, step increases may be withheld by a department head. See, G.L. c. 30, §46(c)(3), and c. 35, §54 for state and county employees, respectively.

[7/]This should be distinguished from the situation where someone in a different division in the same agency or someone outside of an agency gives a recommendation or reference regarding a candidate for a job. For example, a municipal planning board member who called a supervisor in the Department of Public Works (DPW) to recommend a family member for a DPW job would not be participating personally and substantially in the hiring decision. Similarly, a state official may recommend some one to another state agency for a job if this is done without placing improper pressure on the state agency. Section 23 concerns could arise, however, if pressure is or appears to be exerted. Indeed, an outsider's recommendation can involve such substantial pressure on an agency as to be deemed personal and substantial participation by the outsider, thereby, violating §6. **In the Matter of James Craven**, 1980 SEC 17.

[8/]The Commission recognizes that this is a difficult issue, because a family member's financial interest may or may not be affected by the choice of who will make the decision. Nevertheless, because it is not practical to determine which delegations are proper and which are not, and because such delegations can play a critical role in the hiring process, the Commission has determined that any such delegations constitute personal and substantial participation.

State and County Appointed Officials

For state and county appointed officials, the rule is quite specific: if their duties would otherwise require them to participate in a particular matter in which a family member has a financial interest, they must disclose all of the relevant facts to their appointing authority and the Commission, and the appointing authority must then decide whether to undertake the function himself or herself, assign it to someone else, or allow the official to participate. If the appointing authority decides to authorize the public official to participate, he or she must do so explicitly in writing, and a copy of that authorization must be submitted to the Commission.

Municipal Appointed Officials

In contrast, under the conflict law, municipal officials may abstain from participating in the matter and thereby avoid any violation. They do not have to disclose to anyone that they are abstaining. Alternatively, they may seek the authorization from their appointing authority to participate, but the authorization must be granted in writing. Copies of the request and the authorization do not have to be filed with the Commission but they must be available for public inspection.

Elected Officials

Because elected officials do not have an appointing authority, they cannot take advantage of the disclosure and authorization provisions available to appointed officials. There is no statutory mechanism which permits their participation without violating the statute, and, therefore, they must abstain from participation.

V. ACTION BY SUBORDINATES

The one remaining issue is whether an elected official (or an appointed municipal official who chooses not to seek an authorization to participate) may abstain from the process entirely and have a subordinate handle the hiring (or other personnel) decision. This situation is distinguishable from the delegation of a hiring decision by an elected official. As indicated above, delegation is prohibited. The question is whether the elected official may simply abstain and, without providing any direction, leave to the subordinate the decision to hire (or promote, etc.) the family member.

The question of whether the subordinate has the authority to perform the duty in place of their superior is not addressed by the conflict of interest law. The answer must be determined by interpreting the statute which creates the principal official's position, and, specifically, any language which might provide a mechanism permitting a subordinate to act following the "disability" (whether physical, mental, or otherwise, including a conflict of interest) of the principal official.

A review of many such statutes reveals no consistent rule indicating when such authority may be exercised by a subordinate. Accordingly, any response the Commission will give to a request for an opinion on how the conflict of interest law will apply where an elected official abstains and a subordinate seeks to hire will be

conditioned on the official's obtaining an opinion as to the legality of the personnel action by the subordinate. State officials should request such an opinion from the attorney general; municipal employees from the town or corporation counsel; and county employees from the legal counsel for the county.[9/]

VI. ENFORCEMENT POLICY

Until the Supreme Judicial Court concluded in August, 1983 that §§6, 13 and 19 prohibited nepotism, there was, in the Commission's view, legitimate uncertainty as to whether those sections did apply to nepotism conflicts.

In exercising its enforcement discretion, the Commission has, as a matter of fairness, given deference to this uncertainty when the primary violation, the hiring, has occurred prior to the 1983 Supreme Judicial Court decision. Thus, the Commission has resolved numerous nepotism violations involving hirings prior to August 1983 with confidential letters apprising the public official of the violation. Similarly, when the hiring has occurred prior to August 1983, but additional violations involving

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[9/]Even in those instances where a law authorizes a subordinate to assume the hiring role, two significant issues arise under §23 of the conflict law. First, the subordinate may not use their position to secure an unwarranted privilege for the applicant, i.e. hire the family member because of their relationship rather than his or her qualifications. If the subordinate so hired an unqualified family member, he or she would violate §23(b)(2).

Secondly, where the subordinate hires their supervisor's family member and where the subordinate serves at the pleasure of their supervisor, the question inevitably arises whether the subordinate can realistically make an objective decision regarding the family member. It would seem difficult, or nearly impossible, to avoid the appearance of a lack of objectivity. Thus, a problem is created under §23(b)(3), which prohibits an official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can unduly enjoy their favor in the performance of their official duties.

Under a 1986 amendment to §23(b)(3), any such conclusion will be deemed unreasonable if the subordinate discloses in writing to his appointing authority, or if no appointing authority exists (or, of course, if the appointing authority is the same person who was originally disqualified), discloses publicly that they are making a decision affecting their supervisor's immediate family member.

Public disclosure is not defined in the conflict law, although the statute makes it clear that all c. 268A disclosures must be made in writing. In fulfilling its function to interpret the statute, the Commission has determined that for state and county officials, this written public disclosure should be made to the Commission, where such disclosure will be a matter of public record. For municipal officials, the disclosure should be made, again in writing, to the city or town clerk.

promotions or salary increases involving the same family member have occurred thereafter, the Commission, again as a matter of fairness,[10/] has resolved these cases in the same confidential manner.

When the family member is still in the official's employ, the Commission has explained the conditions which must be met if the person is to remain an employee. If an appointed official is involved, they must inform their appointing authority and the appointing authority must decide how the situation should be resolved. If the official is elected, the Commission has sought to identify an independent "appointing authority" to make the same determination. For example, county commissioners have been designated to perform ongoing supervisory functions or make promotion decisions regarding an elected county official's immediate family member.[11/] The Commission will generally follow this approach as to any nepotism violation which took place prior to the date of this advisory if the original hiring was before August 1983. These situations will be resolved with confidential letters.[12/]

The fairness considerations which dictate confidential resolutions of nepotism violations occurring prior to August 1983 are not present for violations occurring after that date. These will be handled, as are all other c. 268A violations, on a case-by-case basis within these general guidelines:

1. The more serious nepotism violations e.g. hiring, promotions and substantial salary increases, will be resolved publicly with fines and, where appropriate, action seeking resignation or rescission of the personnel actions involved.
2. Less serious violations may be appropriate for public resolution without a fine, or if sufficiently minor, with a confidential letter.

CONCLUSION

This advisory highlights the most common nepotism violations. An advisory cannot deal with every possible situation and indeed, may raise as many questions as it answers. The Commission encourages public officials and employees at all levels of government to seek advice from the Commission as to how the law applies to their own situations.

[10/]Typically those situations involved a family member who was hired years prior to 1983, who was promoted or received salary increases prior to 1983, and then received a promotion, salary increase, or was being supervised by the public official after 1983 as well.

[11/]In resolving such violations, the Commission will insist that ongoing personnel decisions be made by an independent appointing authority, if one can be identified, rather than allowing abstention and the assumption of those duties by a subordinate.

[12/]Especially egregious circumstances may require public resolution and a fine.

DATE AUTHORIZED: December 15, 1986
REVISED: December 7, 1990

The Commission issues Commission Advisories periodically to interpret various provisions of the conflict of interest law. Advisories respond to issues which arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. Copies of this Advisory and other Advisories are available from the Commission office.

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COMMISSION ADVISORY NO. 13A

AGENCY

PART A: MUNICIPAL EMPLOYEES ACTING AS AGENT*

INTRODUCTION

Massachusetts General Laws Chapter 268A §17(c) prohibits municipal employees, including elected officials, from acting as agent (or attorney) for anyone other than their municipality in connection with any matter in which their municipality is a party or has a direct and substantial interest. This provision is intended to prevent divided loyalties which would result if local employees attempted to "serve two masters" -- i.e., their municipality and a second party -- with different or conflicting interests. Section 17 is based on the principle that public employees should be loyal to their public employer, and where their loyalty to the municipality conflicts with their loyalty to a private party or employer, the municipality's interest must win out.

For instance, on matters involving their city or town, local employees are prohibited from acting as agents for other individuals, corporations, the state or federal government, advocacy groups, business partnerships, trusts, associations, charitable organizations, and the like. Types of activities prohibited by §17 include: submitting applications or supporting documentation; preparing documents that require a professional seal; contacting other people, groups or agencies; writing letters; serving as attorney; and serving as spokesperson.

Note that §17 not only prohibits municipal employees from representing private parties before their *own* board or agency, but also prohibits them from representing anyone

- before *other* municipal boards and agencies
- before state, county or federal agencies
- to private business or charitable organizations, or
- to private individuals

in any instance where their municipality is a party to, or has a direct and substantial interest in, the matter.

The purpose of this advisory is to assist local employees and officials to recognize those situations where they are prohibited from acting as the representative for another, and to enumerate exceptions to the law where they exist. Examples in this advisory are for purposes of illustration only. Whether or not §17 is triggered will depend on the specific facts of the situation.

* Part B of Advisory 13 covers State employees; Part C covers County employees.

MATTERS IN WHICH THE MUNICIPALITY HAS A "DIRECT AND SUBSTANTIAL INTEREST"

Before acting in a private capacity in connection with a particular matter. local employees should first determine if their municipality is a party to or has a "direct and substantial interest" in the matter. Examples of these situations include:

- any matter pending before, under the official jurisdiction of, or involving action by a municipal agency, board, commission, authority or other body;
- any effort to change municipal regulations, policies or procedures;
- any contract, court case or other legal matter in which the city or town is a party, or otherwise has a direct and substantial interest; or
- any ruling or other action by a federal, county, regional or state agency involving matters which are subject to regulation by the municipality.

If their municipality is *not* a party and does *not* have a "direct and substantial interest" in the matter, the restrictions of §17 will not be triggered, and the local employee may act as agent, representative or attorney.

PROHIBITION ON ACTING AS AGENT FOR ANOTHER

If the city or town *does* have a "direct and substantial interest" in the matter, the municipal employee must also determine whether an activity would constitute "acting as agent". Section 17(c) prohibits a local employee from acting as agent in connection with such matters -- even if the employee is not paid for his or her actions.

An agent is anyone who represents another person or organization in their dealings with a third party. Almost any instance where the municipal employee is acting on behalf of someone else by:

- contacting or communicating with a third party;
- acting as a liaison with a third party;
- providing documents to a third party; or
- serving as spokesperson before a third party

can be considered "acting as agent".

Note that the restrictions of §17(c) are not triggered if the municipal employee is not *representing* someone before a third party. A municipal employee may offer advice to others and may help plan strategies, as long as his or her activity does not reach the level of "acting as agent". (Note, however, that the municipal employee *may* violate §17(a) if he or she accepts pay or other compensation for such activities.)

For example, a municipal employee may *not* submit a grant application to a local agency on behalf of his neighbor because he is more familiar with the application procedures than she is; this action would constitute acting as an agent, even if it is done merely as a favor and for free. However, the employee *may* advise his neighbor on the application procedures and the content of the application.

A municipal employee may *not* sign and send letters on behalf of a grassroots organization advocating a change in local government regulations, even if the letters are addressed to private individuals. The employee *may* participate in committee discussions to plan the mailing, as long as the letter is signed and sent by some other member of the organization.

A municipal employee may *not* attend a community meeting and speak on behalf of a private company, if the city or town is a party to or has a direct and substantial interest in the matter being discussed at the meeting. However, the employee *may* help the company's officials develop a strategy to mitigate the community's concerns.

There are several specific exceptions to the general prohibition that municipal employees may not act as an agent in matters of concern to their municipalities.

PERMITTED CONSTITUENCY WORK

Municipal employees may generally act as agents for others if their municipal jobs authorize it. This applies to both appointed and elected officials performing constituency work.

Certain government jobs authorize employees to act as the agents for private parties concerning matters of interest to the municipality. For example, a Housing Authority employee's responsibility may include advocating on behalf of low-income citizens to increase the number of local affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low-income citizen).

The following guidelines should be used to help determine what is permissible constituency work and what is a prohibited act of agency. Generally, a municipal employee who acts on behalf of a private citizen will be considered to be performing constituency work if:

- the actions are within the scope of the municipal employee's job responsibilities;
- the municipal employee receives no compensation beyond his or her regular salary;
- the municipal employee has no financial interest in the matter;
- the constituent is not a relative or a business associate, or a partner, trustee, officer or director of an organization with which the municipal employee is associated;
- the municipal employee is not taking action as the constituent's attorney; and
- the constituent lives or does business within the city or town.

On the other hand, if a municipal employee represents a relative, his or her employer or a business associate before local agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will not be considered legitimate constituency work and are prohibited.

Remember that allowable constituency work includes *only* those activities "within the proper discharge of official duties." An economic development specialist would *not* be performing permissible constituency work if she called the Tax Assessor's Office to discuss her friend's tax assessment, since the tax assessment has nothing to do with the development specialist's official duties. Alternatively, if a Council on Aging employee pursues a citizen's complaint against a service provider, this *is* a permissible constituency service since the provider is contracted with and supervised by the Council on Aging.

The Ethics Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude ... to determine what constitute[s] the proper discharge of official duties ... " *EC-COI-83-137.* Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties," the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ... " *Id.*

If the employee is unsure whether his or her action on behalf of a constituent is in "the proper discharge of official duties," the employee should seek legal advice from his or her city or town counsel or the Legal Division of the State Ethics Commission.

SPECIAL MUNICIPAL EMPLOYEES

"Special municipal employees" may generally act as agents before municipal agencies other than their own.

Municipal employees are considered "special municipal employees" if:

a. their municipal position is uncompensated, or they work for the municipality for less than 800 hours a year, or they hold a contract or position which allows for private employment during "normal working hours";
b. they hold a position which the city council, board of selectmen, or board of aldermen have designated to be a "special municipal employee" position; *and*
c. they are not the Mayor, nor a member of the city council, board of selectmen or board of aldermen.

Note that in municipalities with a population of 10,000 or less, selectmen are automatically designated as "special municipal employees."

If a municipal employee holds a job that has been designated a "special municipal employee" position, the employee may represent private parties on matters of direct and substantial interest to their city or town *if*:

a. the employee has not participated at any time as a municipal employee or special municipal employee in the matter;
b. the matter is not and has not been the subject of the employee's official responsibility; and
c. the matter is not pending in the municipal agency or board for which the employee works.

There is one narrow instance where a special municipal employee may represent a private party before the board he or she works for -- the special municipal employee may not be a member of the board, must work fewer than 60 days in any 365-day period, and must have neither participated in the matter nor had official responsibility for it.

Also, "special municipal employees" may generally assist with work under a contract with the municipality, if their appointing authority certifies in writing that the interest of the municipality

requires such aid or assistance (a copy of this certification must be filed with the city or town clerk, and is a public record).

Also note that the terms "participation" and "official responsibility" are broadly defined in the statute. "Participation" includes: giving advice or making recommendations: drafting or revising; approving or disapproving; declining to act; delegating; investigating; and otherwise personally affecting a matter. "Official responsibility" is defined as the ability or opportunity to approve, disapprove or otherwise direct an action, and includes: instances where the employee is an intermediate decision-maker; instances where the employee is the final authority; and instances where the authority is not exercised personally, but rather through subordinates. A matter may be considered under an employee's "official responsibility" even if he or she abstains from participating in it.

For more information about this exemption, contact your city or town counsel or the Legal Division of the State Ethics Commission.

ASSISTING SUBJECTS OF DISCIPLINARY PROCEEDINGS

Section 17 also allows municipal employees to assist anyone who is the subject of disciplinary or other personnel proceedings, provided that they are not paid for the representation.

ASSISTING IMMEDIATE FAMILY MEMBERS

In many instances, municipal employees may act as agents for members of their immediate families, or for anyone with whom they have a "fiduciary" relationship, if they first get permission from their appointing authority. This exemption is *not* available to elected officials; nor is it available for matters in which the employees have participated, or which are under their official responsibility.

The conflict of interest law recognizes that municipal employees may be asked to assist members of their immediate families in dealing with local government matters. "Immediate family" includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits an appointed municipal employee to act as the paid or unpaid agent for members of his or her immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, as long as the employee has received prior permission from his or her appointing authority and does not participate in (nor have responsibility for) the matter involved.

A municipal employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship):

a. the municipal employee must be appointed (not elected);
b. the municipal employee must be representing a family member or a person for whom the employee is a fiduciary on a matter in which the employee did not participate (as a local official), and for which the employee did not have official responsibility; and
c. the municipal employee must receive written permission from the official who appointed the employee to his or her position *before* the action occurs.

TESTIMONY UNDER OATH

Municipal employees are generally allowed to give testimony under oath; however, they should contact the Ethics Commission's Legal Division before serving as a *paid* witness.

MATTERS OF GENERAL LEGISLATION

Municipal employees may represent others on matters of general legislation, and home-rule petitions. For example, municipal employees may represent advocacy groups or other parties in order to draft, promote or oppose general legislation, or legislation related to their municipalities' governmental organization, powers, duties, finances or property. Note that matters involving *other* types of "special legislation", municipal regulations or administrative policies are *not* eligible for this exemption.

For more information about this exemption, or for a determination as to whether a bill is "general legislation" or "special legislation", contact your city or town counsel or the Legal Division of the State Ethics Commission.

REPRESENTING ONE'S OWN INTERESTS AND PERSONAL POINTS OF VIEW

Since acting on one's *own* behalf is not considered acting as agent, a municipal employee may always represent his or her own interests or points of view. For instance, a local employee may file her own grant application, or represent himself before the Zoning Appeals Board.

Note, however, that in matters involving the city or town, a municipal employee may *not* act on behalf of his or her own business partnership; representing the partnership would, by definition, involve acting as an agent.

Municipal employees may represent themselves before their own agencies, although they may *not* take any type of official action on the matter that affects themselves. In this situation, the employees should make every effort to clarify that they are acting on their own behalf, including:

- stating, in all written correspondence, that they are acting on their own behalf, and in their personal capacities rather than their official role;
- sitting in the audience before speaking at a hearing or public meeting, rather than sitting with other officials or staff members;
- making a public declaration, to be included in the minutes of the meeting, that they are acting on their own behalf, and in their personal capacities rather than their official role; and
- leaving the room during any Executive Session deliberations on the matter.

Municipal employees may also express their personal points of view concerning a matter pending before local government agencies. However, in such a case, the employee should clarify the situation by explaining that his or her comments constitute a personal opinion, and are not made on behalf of any group, organization, business or other individual. Without such a clarifying statement, the circumstances surrounding the employee's comments could be interpreted to constitute acting as an agent.

Note that when representing themselves or expressing personal points of view, municipal employees must *also* observe §19 of the conflict law, which prohibits municipal employees from taking any type of official action on matters which affect their own financial interests, or the financial interests of their immediate families, businesses or other organizations with which they are closely associated.

CONCLUSION

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their city or town counsel or the Legal Division of the State Ethics Commission at (617) 727-0060.

AUTHORIZED: January 6, 1988
REVISED: July 12, 1994

Massachusetts General Laws Chapter 268A, Section 17.
Municipal employees; gift or receipt of compensation from other than municipality; acting as agent or attorney.

Section 17. (a) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

A special municipal employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a municipal employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a municipal employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the official responsible for appointment to his position approves.

This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided, that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection. .

This section shall not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

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COMMISSION ADVISORY NO. 4

POLITICAL ACTIVITY

INTRODUCTION

The Commission has received numerous inquiries regarding the application of Chapter 268A of the Massachusetts General Laws (the conflict of interest law) to the political activities of public employees. Although the conflict law does not explicitly address political activity by public employees, certain provisions apply to conducting or participating in a political campaign. The purpose of this Advisory is to explain to public employees (i.e., all current officers and employees of Massachusetts state, county, and municipal government agencies, full-time and part-time, paid and unpaid) how G.L. c. 268A applies to their political activities.

In most cases, public employees are free to engage in political activities on their own time as individuals, subject to the limitations discussed in this Advisory (including the campaign finance law's prohibition against political fundraising by appointed, compensated public employees). Nothing in G.L. c. 268A prohibits a public employee from running for any public office, including seeking re-election. The conflict law does not require a candidate to take a leave of absence from his or her public job, but the employee's own agency may require such a leave or establish other limitations stricter than those of G.L. c. 268A. If a public employee is elected to another public office, certain restrictions (not discussed in this Advisory) may apply to holding both jobs at the same time; the Commission's Legal Division can provide advice about multiple office holding.

For the first three subjects discussed in this Advisory (campaign use of public resources, campaigning on the job, and solicitation and fundraising), the state campaign finance law (G.L. c. 55) often, but not always, establishes stricter standards than G.L. c. 268A. The state Office of Campaign and Political Finance (OCPF) administers and enforces G.L. c. 55, and can provide complete advice about its interpretation (see Appendix B).

Section 23 of the conflict law contains standards of conduct that apply to all public employees in the Commonwealth. Two of those standards provide that current public employees may not:

- use or attempt to use their official position to secure unwarranted privileges or exemptions of substantial value for themselves or others (§23[b][2]); or

- act in a manner that would cause a reasonable person to conclude that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are unduly affected by the kinship, rank, position or influence of any party or person. It is unreasonable to so conclude if the officer or employee has disclosed in writing to his or her appointing authority or, if no appointing authority exists, discloses in a manner that is public in nature, the facts that would otherwise lead to such a conclusion. (§23[b][3])

In various advisory opinions issued to state, county and municipal employees, the Commission has discussed the specific application of these standards in connection with political activity. *See, e.g., EC-COI-92-12; 92-7; 92-5; 90-9; 85-29.*

SUMMARY

In summary, as explained in detail below, the Massachusetts conflict of interest law (G.L. c. 268A)[1/] **prohibits** all state, county, and municipal public employees, whether compensated or not, from:

- using any public resources or facilities, or the state seal or coat of arms, for campaign purposes.

- engaging in any campaign activities during their normal public working hours.

- (for appointed employees) soliciting campaign contributions or services, or anything else of substantial value, from subordinate employees, vendors they oversee, or anyone within their regulatory jurisdiction.

- representing a campaign (or anyone else) in connection with some matter in which the employee's own level of government (state or local) has a direct and substantial interest (unless they are "special" employees).

I. CAMPAIGN USE OF PUBLIC RESOURCES

The Commission has consistently ruled that the use of public resources of substantial value ($50 or more), available by virtue of one's public employment, for the purpose of conducting or supporting a political campaign amounts to the use of

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[1/]In addition, as explained below, the state campaign finance law (G.L. c. 55) sometimes establishes stricter standards. Among other things, it prohibits public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone; prohibits **anyone** from giving, soliciting, or receiving political funds in any public building; and forbids requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF (see Appendix B).

one's official position to secure an unwarranted privilege for oneself or another.[2/] These resources include publicly provided stationery, office supplies, utilities, telephones, office equipment (e.g. copying machines, typewriters, word processors, fax machines), office space or other facilities. These are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees. The taxpayers of the Commonwealth should not be forced to subsidize the political activities of those employed in government agencies.

Moreover, the Commission has ruled that candidates who are public officials or employees may not use the state seal (or state "coat of arms") even on privately purchased stationery, for fundraising or other campaign purposes. The seal may be used solely for official state purposes, not for the private purpose of a campaign.

II. CAMPAIGNING ON THE JOB

Public employees may not engage in political activities during their normal working hours. While employed by the taxpayers, they are to be doing the taxpayers' work, and not politicking for themselves or individual candidates, or in support of or opposition to election ballot questions. For appointed public employees, normal working hours are those set by the employer through regulations or otherwise, or as designated in the applicable collective bargaining agreement. Where such hours have not been clearly defined, the employee is responsible for resolving any ambiguity with his or her appointing official before engaging in political work.

III. SOLICITATION AND FUNDRAISING

The Commission has also repeatedly held that the conflict of interest law (§23[b][2]) forbids public employees from soliciting anything of substantial value from those they oversee, because of the "inherently coercive" nature of such solicitations. The Commission has applied this principle to political campaigns. Thus, **appointed** public employees may not solicit campaign assistance from persons they regulate or who are under their supervision. For example, they may not use their official title or authority, or their presence at a meeting under coercive circumstances, to solicit campaign assistance. They may also not solicit private, paid business relationships with such persons they oversee (including, for example, the provision of paid political consulting services); even if persons under the public employee's jurisdiction choose to establish such private business relationships, the supervisory public employee must publicly disclose in writing the existence of the private business relationship, and the facts that the person under his jurisdiction initiated it and entered into it entirely

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[2/] Although the State Ethics Commission has reached the conclusions in parts I and II under the state conflict of interest law, G.L. c. 268A, §23(b)(2), OCPF has reached similar conclusions under the state campaign finance law, G.L. c. 55, as interpreted by a state Supreme Judicial Court decision, *Anderson v. City of Boston*, 376 Mass. 178 (1978), *appeal dismissed*, 439 U.S. 1069 (1979). See *OCPF-IB-91-01* (available from OCPF; see Appendix B below). Note that G.L. c. 55 and *Anderson* prohibit campaign use of public resources even if they are not of "substantial value."

voluntarily.

The same principle applies to campaign fundraising. Thus, appointed public employees (whether compensated or not) may not solicit political contributions from other public employees whom they supervise, vendors that they oversee, or anyone over whom they may have regulatory power.[3/]

It should be noted again that the most significant restrictions on campaign fundraising by Massachusetts public employees are not enforced by the State Ethics Commission; they are found in the state campaign finance law (G.L. c. 55), which is administered by the state Office of Campaign and Political Finance (OCPF). Among other things, these restrictions prohibit public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone;[4/] prohibit **anyone** from giving, soliciting, or receiving political funds in any public building; and forbid requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF (see Appendix B below).

IV. REPRESENTING CAMPAIGNS IN DEALINGS WITH THE GOVERNMENT

The conflict of interest law (G.L. c. 268A, §§4, 11, 17) also prohibits a public employee from acting as agent or attorney for, or receiving compensation from, anyone other than the government in connection with a particular matter in which the same level of government (state, county, or municipal) is a party or has a direct and substantial interest. Both the state and municipalities have a direct and substantial interest in some election-related matters, including the regulation of campaign finances and the conduct of elections. Thus, a full-time state or municipal employee may not represent a campaign (or anyone else) in dealings with the same level of government. For example, a full-time municipal employee could not (even as an unpaid volunteer) sign a municipal campaign finance report, to be filed with the town clerk;[5/] nor could the employee be paid to help prepare the report, even if he did not sign or deliver it. A full-time state employee could not act as a candidate's lawyer (even on her own time and without a fee) before the State Ballot Law Commission; nor could the employee be paid to review signatures on nomination papers in preparation for such an objection proceeding, even if she never appeared before the state Commission.

[3/]Sections 2 and 3 of G.L. c. 268A prohibit both appointed and **elected** public officials from soliciting or accepting campaign contributions or political services **in return for** being influenced in their official acts. *In re Nolan*, 1989 SEC 415. *See Commonwealth v. Borans*, 379 Mass. 117, 142 (1979). *See also* G.L. c. 55, §§16-17; c. 56, §§33-36 (criminal statutes not enforced by Commission).

[4/]For example, OCPF has applied this statute, G.L. c. 55, §13, to prohibit appointed, compensated public employees from using their homes for a fundraising event, selling or distributing fundraising tickets, or including their names on the letterhead of a fundraising letter or on an invitation to a fundraising event. See also *OCPF-IB-92-01* (applying this statute to prohibit acting as a featured speaker or panelist at a political fundraising event).

[5/]OCPF has interpreted G.L. c. 55, §13 to prohibit an appointed, compensated public employee from being a treasurer for a candidate or a political committee.

This prohibition is much narrower in scope for part-time or unpaid public employees who are "special" employees.[6/] Since the prohibition applies only to representation in connection with matters relating to a "special" employee's own agency, it will prohibit such election-related representation only if the "special" employee is employed by the election agency itself.

APPENDIX A. CAMPAIGN ACTIVITIES BY ELECTION OFFICIALS

"Election officials" are the public employees who actually conduct elections; they include the Secretary of State and the Secretary's election staff, State Ballot Law Commissioners, and at the municipal level, city and town clerks, election commissioners, registrars, and their full-time and part-time staffs, including the election officers who staff the polls on election day. In addition to establishing the general restrictions above that apply to all public employees,[7/] the conflict of interest law applies to these election officials in other ways.

First, candidates for compensated offices have a financial interest in their own election. Therefore, §§6 and 19 of the conflict law ordinarily[8/] prohibit election

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[6/]A "special state employee" is an appointed state employee who is unpaid, or is allowed to do personal or private work during normal working hours (and discloses this in writing beforehand to the State Ethics Commission), or in fact earns compensation for no more than 800 hours during the preceding 365 days. G.L. c. 268A, §1(o). A "special municipal employee" is an elected or appointed municipal employee (except a mayor, alderman, councillor, or a selectman in a town of more than 10,000 population) who meets the same requirements (except for disclosure to this Commission) **and** holds a position so designated by vote of the City Council or Selectmen. *Id.* §1(n).

[7/]Note that G.L. c. 268A, §§4, 17 (discussed in part IV above) prohibit even election officials who are "special" employees from representing anyone in dealings with their own election agency.

However, designating part-time municipal election officials, such as registrars, assistant registrars, and election officers, as "special municipal employees" is important for another reason. If they are not so designated, G.L. c. 268A, §20 prohibits them from also holding full-time paid municipal positions. *See Commission Advisory No. 7 (Multiple Office Holding at the Local Level).* If part-time election officials are designated as "specials," they may continue to hold their regular full-time, municipal jobs if: (1) their election official positions are filled after public notice, (2) they make public written disclosure to the City or Town Clerk of their salaries in both jobs, (3) their election supervisor files with the Clerk a written certificate that no regular employee of the supervisor's office is available, **and** (4) the City Council or Selectmen vote to exempt them by name. *See* G.L. c. 268A, §20(b), (c), (d).

[8/]An election official may participate nevertheless in two situations. First, an **appointed** official's appointing authority could determine in writing beforehand that the financial interest was not so substantial as to interfere with the integrity of the official's services (for state officials, this determination and the official's written disclosure must be filed with the Commission). Second, if no substitute is available

officials from participating in decisions that can affect the outcome of an election at which a candidate for a compensated office is the official himself or herself, or the official's immediate family member[9/] or business partner; or in which a political committee for which the official is an officer or a paid employee has an interest; or in which the official otherwise has a financial interest in the outcome. Examples of these decisions (which the conflict law calls "particular matters") are decisions about counting votes or absentee ballots, about eligibility to vote or to register, and about certifying, filing, and objecting to nomination papers and ballot question petitions. Participation includes not only making the decision, but discussing or advising about it. If an election official is unable to participate, the election laws often provide for a substitute.[10/] For example, an elected Town Clerk who is a candidate for re-election may not participate in decisions that may affect his or her own election, because other officials are available to make these decisions (depending on the decision, an assistant or temporary clerk, other registrars, or election officers).

Second, G.L. c. 268A, §23(b)(2) (discussed in the Introduction above) prohibits election officials from using their official positions to secure an unwarranted privilege for a candidate or anyone else. Thus, while this section does not prohibit election officials who have publicly supported a candidate (or a position on a ballot question) from participating in official election-related decisions, they must base such decisions solely on the merits, using the same objective standards they would apply to all similar decisions. These objective standards are found, for example, in the election statutes, relevant case law, and regulations of the Secretary of State. Furthermore, §23(b)(3) requires election officials who have actively participated in campaigns or publicly supported a candidate (or a position on a ballot question) to make a public, written disclosure[11/] of these facts before they participate in any decision that can affect the outcome of the relevant election.

Finally, §23(e) allows election officials' supervisors to establish and enforce additional standards of conduct. A May 1990 advisory from the State Secretary's Elections Division, for example, advises that "in most cases, election officials should choose between publicly displaying support for a candidate (or a position on a ballot question) and participating in official decisions that may affect that candidate (or ballot question)." In this connection, the Secretary's advisory notes that some city and town clerks have prohibited election officers from displaying political buttons and bumper stickers even on their "off" hours, although this policy is not required by the

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(see footnote 10), the "rule of necessity" may allow the official to participate under some circumstances; consult the State Ethics Commission for details.

[9/]An official's "immediate family" is the official and his or her spouse, and their parents, children, brothers and sisters.

[10/]For example, the first deputy Secretary would substitute for the Secretary of State (G.L. c. 9, §3). An assistant clerk, or a temporary clerk appointed by the Mayor or Selectmen, would substitute for the City or Town Clerk (G.L. c. 41, §§14, 18, 19). A temporary registrar or election commissioner could similarly be appointed (G.L. c. 51, §20).

[11/]Appointed election officials make this disclosure to their appointing authority. The Secretary makes it to the State Ethics Commission. An elected town clerk posts it in his or her own office.

state conflict of interest or election laws.

APPENDIX B. OTHER AGENCIES

The State Ethics Commission can give advice only about the state conflict of interest law, G.L. c. 268A. Other state and federal laws regulate the political activities of Massachusetts public employees; they are administered by the agencies listed below. Furthermore, individual public agencies may also place limitations on the political activities of their employees. Public employees should determine what restrictions apply to them in their own public jobs.

For more information about these other laws and related subjects, contact:

for state campaign finance law (G.L. c. 55):

Office of Campaign and Political Finance
One Ashburton Place, Room 411
Boston, MA 02108
(617) 727-8352 or 1-800-462-OCPF

for campaign finance law for federal office only:

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
1-800-424-9530

for federal Hatch Act (applies to state and local employees paid at least partly from federal funds):

Office of Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20005
1-800-872-9855

for state laws about election procedures (G.L. cc. 50-54):

Elections Division
Office of the Secretary of State
One Ashburton Place, Room 1705
Boston, MA 02108
(617) 727-2828 or 1-800-462-VOTE

For more information about the state conflict of interest and financial disclosure laws (G.L. cc. 268A & 268B), including the subjects discussed in this Advisory, please contact:

Legal Division
State Ethics Commission
One Ashburton Place, Room 619
Boston, MA 02108
(617) 727-0060

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State Ethics Commission

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COMMISSION ADVISORY NO. 5

MUNICIPAL DISTRICTS AND AUTHORITIES AND THEIR SPECIAL MUNICIPAL EMPLOYEES

The conflict of interest law, Chapter 268A of the General Laws, applies to all municipal employees, whether elected or appointed, full-time or part-time, paid or unpaid. The law, however, creates a category of employees called "special municipal employees" to whom the law in some instances will apply in a less restrictive way.

Questions have been raised as to:

* whether members and employees of agencies that operate independently of city or town governments, whether within the boundaries of a single municipality or as regional agencies, are also covered by the law,
* whether such members and employees may be made "special municipal employees," and
* if so, by whom.

Typical examples of municipal agencies that operate independently of city and town governments are local housing authorities, local water and fire districts and regional school districts. The above questions take on added importance because often members and employees of such authorities or districts have contracts with or hold other appointive positions in the same authority or district. Moreover, members or employees of authorities and districts sometimes also hold positions in other city or town agencies. The propriety of their doing so will turn on whether they are covered by the conflict law and, if so, whether they may be considered "specials."

I. MUNICPAL AGENCIES THAT OPERATE INDEPENDENTLY OF CITY AND TOWN GOVERNMENTS

"Municipal employee" is defined as anyone "performing services for or holding an office, position, employment or membership in a municipal agency." *See* G.L. c. 268A, §1(g). "Municipal agency," in turn, is defined as "any department or office of a city or town government and any council, division board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." *See* §1(f). Given these broad definitions, local housing authorities and local water and fire districts are municipal agencies for purposes of the conflict law, and their members and employees are municipal employees. They perform governmental functions at the municipal level.

The Legislature has explicitly provided that certain agencies that operate independently of city and town governments will be considered municipal agencies for purposes of the conflict of interest law. *See, e.g.,* G.L. c. 121B, §7 (housing authority is a municipal agency for purposes of the conflict of interest law).

The Ethics Commission has also considered the application of the conflict of interest law to regional entities and their employees. The most common example of a regional entity is a regional school district. In 1992, the Appeals Court affirmed a Commission decision finding that members of a regional school committee are municipal employees for purposes of the conflict of interest law. In doing so, the Court concluded that a regional school committee is an instrumentality of each of the member municipalities. *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). In other words, for purposes of the conflict of interest law, the Commission will not consider regional districts to be independent of their member municipalities. Therefore, the employees of the regional entity will be municipal employees of **each** of the municipalities that make up the regional district.

II. SPECIAL MUNICIPAL EMPLOYEES

May members and employees of these authorities and districts be designated as "special municipal employees"? Whether a member or employee of an authority or district is classified as a "special" will affect his or her eligibility to hold, and be compensated for, some other position within the supervision of that authority or district or to otherwise contract with the authority or district (or any of the cities and towns that comprise the district).

Section 1(n) of G.L. c. 268A provides that municipal employees are classified as "specials" by the Board of Selectmen or City Council (or Board of Alderman if there is no City Council) in that municipality. Thus, the law gives the appropriate Board of Selectmen or City Council the designating responsibility and makes no distinction as to which agencies might be involved. Simply put, the Selectmen or Council has this authority, regardless of the degree to which the Board or Council supervises the work of the agency. Accordingly, members and employees of an authority or district may be designated as "specials" just as any other municipal employees. In making its decision, the Board of Selectmen or City Council will use the guidelines set out in the statute. That is:

1. the person must either:
   a. receive no compensation,
   b. work less than 800 hours a year, or
   c. occupy a position which "permits personal or private employment during normal working hours."

2. the Board or Council must be consistent, i.e., treat people who hold equivalent positions in the same way.

The Legislature has explicitly answered the question of special municipal employee status with regard to members and employees of local housing authorites. The statute establishing such authorities states that "each member of a [a housing and redevelopment authority] . . .shall be considered a special municipal employee." Additionally, any person who performs professional services on a part-time, intermittent or consultant basis (such as architect, attorney, engineer, planner, etc.) for a housing or redevelopment authority shall also be a special municipal employee. *See* G.L. c. 121B, §7. In so doing, the Legislature was careful to point out that the Board of Selectmen, Board of Alderman or City Council was not precluded from making other employees of such authorities "specials."

Similarly, with regard to local fire districts, the Legislature has determined that part-time fire fighters and any person who performs professional services on a part-time, intermittent or consultant basis shall be considered a special municipal employee for purposes of the conflict of interest law. *See* G.L. c. 48, §90. As for those employees who are not specified as special municipal employees by statute, the guidelines set out in the definition of "special municipal employee" will be applicable.

With regard to employees of regional entities, the Commission has decided that an employment position or a board position within a regional entity may be designated as a special municipal employee position if so classified by vote of the Board of Selectmen or City Council of **all** of the member municipalities.

A district or authority employee, whose position is not a "special municipal employee" position, would violate §20 of G.L. c. 268A if that individual held another position with that same authority or district or any of the municipalities that comprise a district.[1/] However, as a special, an employee or member will be eligible for an exemption from §20[2/] as long as:

1. he or she files with their city or town clerk a statement making full disclosure of the other employment relationship; and

2. the City Council or Board of Selectmen give its approval to having that position.

[1/]If an employee or board member holds a position in another municipal agency of any constituent city or town, the exemption provided in §20(c) may be applicable. This requires only that a special municipal employee make a written disclosure to the municipal and district clerk.

[2/]Section 20 prohibits a municipal employee from having a financial interest in a contract with his or her city or town. Other employment contracts are included within this prohibition. The §20(d) exemption outlined above would also be available to members and employees who are specials and who have other kinds of contracts with their authority or district (for example, contracts to provide services, to sell equipment, etc.).

Here again, the Board of Selectmen or City Council has a crucial role to play. And, here again, it does not matter whether the Board or Council otherwise participates in any aspect of the authority or district. As for regional entities, the above exemption will require approval from the Board of Selectmen or City Council of all of the member cities or towns.

In summary, we provide you with the following examples:

If you are a member or employee of a local housing authority:

1. you are automatically a "special municipal employee" if you are a member, or if you are providing professional services on a part-time, intermittent or consultant basis; otherwise you will not be considered a special unless the City Council or Board of Selectmen designates your position as such; and

2. as a special, you may hold another position with the authority provided your City Council or Board of Selectmen approves, and you file the required disclosure statement with your City or Town Clerk.

If you are a member or employee of a local fire district:

1. you will be considered a special employee if you are a part-time firefighter or if you provide professional services on a part-time, intermittent or consultant basis; and

2. if you are a special, you may hold another position with the district provided:
   a. you file the required disclosure statement with the district clerk, and
   b. the district prudential committee approves.[3/]

If you are a member or employee of a regional school district:

1. you are not a "special municipal employee" unless the City Council or Board of Selectmen of all of the member municipalities designates your position as such; and

2. if so designated, you may hold another position or contract with the district provided:

   a. you file the required disclosure with the school district clerk, and

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[3/]There are additional restrictions on district boards or authorities concerning their ability to appoint a member to a position under the supervision of that board or commission. *See* G.L. c. 41, §4A; c. 268A, §21A.

b. the City Council or Board of Selectmen of all of the member municipalities approves.[4/]

This advisory does not attempt to explain all the provisions of the conflict law applicable to "special municipal employees." You are advised to call the State Ethics Commission's Legal Division if you seek to contract with or be employed by a municipal agency in addition to your position with an authority or district.

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[4/]If you hold a position with an agency of one of the constituent cities or towns, this approval may not be necessary.